University of Toronto-
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Joint Centre
for Asia Pacific Studies

Canada-Hong Kong: Some Legal Considerations

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edited by William H. Angus

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Canada - Hong Kong: Some Legal Considerations

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Papers presented at the Canada and Hong Kong Workshop

University of Hong Kong, 26 June 1991

Edited by

William H. Angus

Canada and Hong Kong Papers No. 2

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University of Toronto - York University
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Co-Directors, Canada and Hong Kong Project:
Diana Lary and Bernard Luk
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Introduction to the Series: Canada and Hong Kong Papers

This book is the second of a series published by the Canada and Hong Kong Project. The project was set up in 1990, in recognition of the importance of the growing relationship between Canada and Hong Kong. One of the exciting things about this project is the high level of interest that there is now in the relationship between Canada and Hong Kong and the enthusiasm which we have found for doing research on the subject. We have been able to attract a number of scholars and professional people with a detailed knowledge of Canada and Hong Kong to contribute to our series.

The books in this series look at various aspects of the relationship between Canada and Hong Kong in the period leading up to the return of Hong Kong to Chinese sovereignty in 1997. Over the past few years relations between Canada and Hong Kong have increased enormously and have been changed dramatically by the great wave of migration to Canada during the past decade. Since migration is the linchpin of the relationship, some of the books in the series will focus on the emigration climate in Hong Kong and will look at factors which encourage or inhibit migration.

In addition to the co-convenors of the Legal Workshop, William Angus and Johannes Chan, we would like to express our appreciation to Wang Gungwu, Vice Chancellor of the University of Hong Kong; Peter Rhodes, Dean of the Faculty of Law at the University of Hong Kong; and Michael Welsh and Robert Desjardins of the Canadian Commission in Hong Kong, for their support in making this seminar a success. The legal issues workshop was held in conjunction with Festival Canada '91 in Hong Kong. We also extend a special thank you to Jerome Ch'en, York University, for the calligraphy on our cover.

The Canada and Hong Kong Project is funded by the Donner Canadian Foundation. We would like to thank the Foundation for its generosity and for its steady, informed support.

Diana Lary and Bernard Luk
Co-Directors
Canada and Hong Kong Project

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Contributors

William H. Angus is a Professor and Director of the China Exchange Programme at Osgoode Hall Law School of York University. He teaches the course in Immigration Law and is co-instructor with two colleagues for an Intensive Programme in Immigration and Refugee Law, which combines small group instruction and student placements with the judiciary, government, and advocates. His publications include *Canadian Immigration Law, Policy and Process: Material and Cases* (2nd ed., Materials Distribution Centre, Osgoode Hall Law School, York University, 1991), and various other works on immigration and refugee law.

Janice Brabyn is a Lecturer in the Faculty of Law, University of Hong Kong. She has published articles concerning extradition law in the United Kingdom, Singapore, and Hong Kong. Other areas of interest include criminal law and the law of evidence.

Maurice Copithorne is an Associate Counsel with Ladner Downs, Barristers & Solicitors in Vancouver. He is also a professor on a part-time basis at the Faculty of Law, University of British Columbia. He spent many years in the Canadian Foreign Service, holding at various times the position of Legal Advisor at the Department of External Affairs and Canadian Commissioner to Hong Kong.

Roda Mushkat is a Senior Lecturer at the University of Hong Kong, Faculty of Law. She is also a Member of the Israel Bar and practised there for a short time. Since 1979 she has been teaching courses in international law, public law, and jurisprudence at the University of Hong Kong. She has numerous publications on Hong Kong legal issues.

Philip Smart is a Senior Lecturer in the Faculty of Law, University of Hong Kong. Educated at S.O.A.S., University of London, he has written widely on international and commercial law, his latest work being *Cross-Border Insolvency* (London: Butterworths, 1991).

Introduction

That the Basic Law for the Hong Kong Special Administrative Region will have very significant consequences for both the public and private law spheres in Hong Kong before and after 1 July 1997 should come as no surprise to anyone even vaguely familiar with the situation. Indeed, there has already been a substantial quantity of writing on the legal implications of the Basic Law.

To this frequently ambiguous and complex legal scenario may be added the perspective of external jurisdictions such as Canada. Over the last decade, there has been an enormous increase in almost every facet of human endeavour between Hong Kong and Canada. These multifarious activities have produced legal relationships of various kinds. With the advent of the Basic Law, many of the existing legal structures between Hong Kong and Canadian parties may need to adapt to the changing legal scene.

It is within this broader context that a workshop on legal considerations relating to Canada and Hong Kong was jointly organized by the Faculty of Law in the University of Hong Kong and the Canada and Hong Kong Project of the Joint Centre for Asia Pacific Studies at York University in Canada. It was held at Robert Black College in the University of Hong Kong on 26 June 1991.

Five papers were delivered during the morning and afternoon sessions of the workshop. They are reproduced in revised form in this volume. The reader should not strain to discover some logical reason for the order in which the papers appear. This was not a workshop for which the boundaries of each paper were staked out in advance, following which experts within the delineated areas were invited to speak. On the contrary, although the scope for topics of legal significance to Canada and Hong Kong was wide, few legal scholars had yet ventured onto the turf. So it was very much a matter of searching out those who would be willing to explore for the first time the largely uncharted area of legal issues involving Hong Kong and Canada. As a result, the papers bear no necessary relation to each other, although certain common themes do emerge. They are simply set forth in the same order as presented at the workshop, in the view that this sequence is as appropriate as any other in the circum-

stances. What follows, therefore, is a somewhat eclectic collection.

Roda Mushkat's opening paper argues that Hong Kong may have acquired an international legal personality sufficient to preserve its independent identity. If so, Hong Kong would have the ability to operate to some extent in an autonomous fashion in the international arena, a situation which would be of particular importance to Canada in view of the extensive commercial and other relationships between the two jurisdictions at present. To reach this conclusion, Mushkat relies heavily on international law precedents and analogies.

The next paper, by the author of this introduction, focuses on the somewhat more immediate concerns of thousands of Hong Kong inhabitants who wish to emigrate to Canada or might claim Convention refugee status. More emigrants leave Hong Kong for Canada than for any other country. Conversely, Hong Kong is the leading source country for immigrants to Canada. Although Convention refugee claims by persons from Hong Kong are currently minimal, excluding the resettlement of Vietnamese boat people, there is the rather frightening prospect that this situation may change after 1 July 1997. The author examines the various Canadian immigrant categories open to persons from Hong Kong, as well as Canada's reception of Convention refugees.

In the third paper of the workshop, Philip Smart addresses the status of both individuals and corporations in Hong Kong at present. He examines the potential effect of the Basic Law on these questions and suggests that the new Hong Kong Bill of Rights may affect the status of individuals. Obviously, issues of status in Hong Kong will have a very great impact on various private law matters relating to Hong Kong and Canada, for example, in the family law and corporation law areas. Smart takes the position that the present law of Hong Kong on the status of individuals and corporations is inadequate to meet the challenges which will arise in 1997, and advocates radical amendment.

Maurice Copithorne's paper deals with some specific aspects of interaction in civil procedure between Canada and Hong Kong. He examines the current position on service of documents and the taking of evidence abroad, followed by the recognition and enforcement of foreign judgments. Consideration is given to the impact on Hong Kong of the arrangements to take effect in 1997. Out of the myriad of existing and future relationships between Canadian and Hong Kong interests, litigation will almost certainly emerge in some cases to resolve disputes between and among the parties. International litigation lawyers on both sides of the Pacific Ocean will undoubtedly find helpful insights in

Copithorne's paper.

The final workshop paper, by Janice Brabyn on the topic of extradition, delves into a discreet subject matter of obvious importance to both Canada and Hong Kong before and after 1997. For the Canadian reader, the Hong Kong situation will seem very complex indeed. What might be the situation in the Hong Kong Special Administrative Region (SAR) after 1997 is clouded by considerable uncertainty. Brabyn argues for a new set of extradition powers and relations for post-1997. She poses and discusses four preliminary questions to this end. In her view, the Basic Law either facilitates or at least does not foreclose the possibility of the SAR having substantial, if not sole, responsibility for its processes of extradition.

So the papers in this volume are a fairly mixed bag. Nevertheless, they represent what appears to be the only concerted effort so far to focus on legal issues involving Canada and Hong Kong in terms of the changes to come in 1997. No doubt further interest in potential legal problems will develop as that deadline comes closer.

Finally, this introduction would be incomplete if it did not acknowledge the essential contribution of Johannes Chan, Convenor of the Public Law Research Group in the Faculty of Law at the University of Hong Kong, who co-chaired the workshop and discharged most capably the major share of the on-site organizational responsibilities.

William H. Angus

Osgoode Hall Law School
York University
September 1992

Hong Kong's International Personality: Issues and Implications

Roda Mushkat

Hong Kong's relationship with Canada in the years ahead will be largely determined by the territory's ability to operate in an autonomous fashion in the international arena. If constrained in this respect, Hong Kong would lose its economic vitality and become a source of "distress immigration," thus posing policy problems and practical difficulties for Canada. If allowed to exercise its traditional freedoms, Hong Kong could continue to engage in mutually rewarding and wide-ranging exchanges with the country that has acted as a magnet for Hong Kong's increasingly anxious residents.

The purpose of this paper is to show that Hong Kong may claim to have an "international legal personality" and that, at least insofar as international law is concerned, the territory has sufficient room for manoeuvre to preserve its independent identity. If the conclusion is valid, Hong Kong should be perceived as an asset rather than a liability for Canada.

Hong Kong's Claim to "International Personality"

While not regarded by international law writers as an "established legal person," Hong Kong may nonetheless present a claim to "international personality"[1] founded on several recognized grounds: 1) its legal proximity to states; 2) by analogy to special treaty-created international regimes; 3) as an entity *sui generis*; and 4) by virtue of the right of self determination.

Traditional considerations should not, however, prejudge the issue. Since international legal personality is a relative phenomenon that varies according to the progressive requirements of international life,[2] the determination of Hong Kong's legal status should be made on the basis of an analysis of the territory's particular circumstances and in the context of the character and needs of the present-day international community.

Legal Proximity to Statehood

As the author of a treatise on the subject points out, "there is no generally accepted and satisfactory modern legal definition of statehood."[3] Yet, certain qualifications that "the State as an international legal person should possess" have been commonly admitted as reflecting in general

terms the requirements of statehood under international law. These, according to Article 1 of the 1933 Montevideo Convention on Rights and Duties of States are: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."[4]

If conceptualized in such broad terms, the formal criteria of statehood appear to be satisfied by Hong Kong. There is clearly a population (defined as an aggregate of individuals living together in a community) linked to the territory on a more or less permanent basis who can be regarded as its inhabitants. The physical existence of Hong Kong as a distinct territorial unit within coherent frontiers is well established both factually and legally.[5] An effective government is also in place, exercising jurisdiction over the population and territory of Hong Kong and displaying fundamental legislative and administrative competence in domains such as collection of taxes, promulgation of laws, maintenance of order, dispensation of justice, and the conduct of social affairs. Finally, while not formally independent, Hong Kong possesses considerable latitude to engage in international action autonomously. Its international activities include membership and participation in several international organizations[6] and multilateral conventions,[7] as well as negotiation and conclusion of agreements with foreign governments.[8]

Indeed, the high degree of autonomy enjoyed by Hong Kong in the management of its external affairs has been reaffirmed in the Sino-British Joint Declaration,[9] which seeks to formalize its status as a "separate customs territory" that "may participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles."[10] In addition, it is stipulated that after 1997 the Hong Kong Special Administrative Region [HKSAR] "may on its own, using the name 'Hong Kong, China' maintain and develop relations and conclude and implement agreements with states, regions and relevant organizations in appropriate fields including the economic, trade, financial, monetary, shipping, communications, touristic, cultural and sporting fields."[11] Also relevant in this context are the HKSAR's powers to issue its own currency and passports, regulate immigration to the territory, and institute official and semi-official trade representation abroad, as well as to authorize the establishment of consular missions locally.[12]

Further, without entering the debate whether recognition by other states has a "constitutive"[13] or "declaratory"[14] effect on an entity's status

in international law,[15] the measure of recognition accorded to Hong Kong as an international person may be highlighted. Evidently, Hong Kong's trading partners, co-members of the international organizations referred to earlier, and parties to respective multilateral agreements recognize and respect the separate identity of the territory.[16] The operation overseas of Hong Kong Government Offices and other official representatives (such as the Hong Kong Trade Development Council) and the direct dealings with consular officers of foreign governments based in the territory also reflect—apart from a significant degree and range of international activity—a recognition of Hong Kong's capacity to engage in international relations.

Hong Kong is not a state and does not claim to be one and, hence, is not recognized as such although, as argued above, it meets the formal criteria of statehood. The territory's—and the HKSAR's—claim to international juridical personality may, nonetheless, be based on it being endowed with the capacity to exercise functions and undertake rights and obligations that are similar to the functions, rights, and obligations exercised or possessed by states (which are established personalities under international law).

Analogy to Special Treaty-Created International Regimes

As laid down by the International Court of Justice,[17] international personality is not limited to states alone. Territorial entities that do not satisfy the criteria of statehood may acquire a separate legal personality under international law. Examples include treaty-created autonomous entities, commonly known as "internationalized territories,"[18] best represented by the (now defunct) Free Treaty of Danzig. Said to be "carved out" by the international community and "given life" in the law of nations as a possible "solution to the problem of conflicting territorial claims and aspirations,"[19] Danzig was deemed to enjoy legal personality governed by rules and principles of international law.[20]

Arguably, the entity envisaged under the Sino-British Joint Declaration—the HKSAR—may be viewed from a similar perspective. "[I]nternationally fixed in the interest of peaceful relations between the East and the West,"[21] it too was conceived not as a grant or delegation of powers under the domestic law of a particular state but as a creation of an international agreement taking due regard of "historical and political realities"[22] (particularly Hong Kong's autonomous character, its role as a major financial centre, and the international nature of its economy). Hence, it may be contended that, from a theoretical standpoint, the HKSAR

derives its validity from the international legal order and is subject to international law which determines its status and regulates its relations with other international entities.

The Sino-British Joint Declaration clearly reflects the intention of the signatories to give the HKSAR an international capacity of its own, separate and distinct from any state that may otherwise be entitled to exercise sovereign authority. The agreement confers upon the HKSAR express functions that imply the possession of international personality. Yet, apart from imposing binding obligations on the parties, the treaty has also created an objective international entity whose rights and responsibilities are governed by international law.

Admittedly, the "consensual" source of personality may give rise to questions concerning "objectivity" (whether valid *erga omnes* or only *vis-à-vis* the states involved). Questions of this type, however, pertain to the effectiveness of the entity and need not detract from the claim to juridical personality. There is little doubt that to function effectively in the international arena, the HKSAR will need wide recognition of its autonomous position, but its international personality is not a function of other parties' willingness to treat it as a separate entity.[23]

An Entity Sui Generis

Rather than emphasize the relevance of traditional criteria of statehood or draw somewhat strained analogies with other established categories, Hong Kong may opt to stress its unique characteristics as a *sui generis* entity deserving to be endowed with international personality. Indeed, an argument could be made that in addition to objectively existing and operating as an international person, Hong Kong is justified in being formally accepted as such for the significant services it renders the international community. Support for a claim along these lines may be adduced from the recognition extended to entities such as the Order of Malta, the Holy See, or national liberation movements whose purported aims (assisting the sick and the poor, leading the Catholic Church, combating colonialism and other forms of subjugation, respectively) have been deemed by a large sector of the international community as useful and legitimate.

Hong Kong has existed as a semi-autonomous political entity for about 150 years, possessing many of the attributes of an independent sovereign state. Due largely to its rule of law-based institutions and practices, the territory has, moreover, established itself as an important player in the global economic arena, evolving into the world's third largest bank-

ing centre behind New York and London, eleventh largest trading entity, and the busiest container port. Hong Kong is also a major foreign exchange and commodities market, the regional headquarters of a large number of multinational enterprises, and Asia's leading communication centre.[24]

It is not surprising, therefore, that the Sino-British Joint Declaration reflects strong determination to preserve the pivotal role played by Hong Kong in both the regional and global economy. The agreement also gives expression to the reality that to enable the territory to continue to operate effectively—and in view of the difficulties involved in assimilating two vastly different cultures and disparate economic systems—Hong Kong's distinctly separate personality must be secured.

Maintaining the functions performed by Hong Kong is, furthermore, in the interest of the international community as a whole. Recognition of the value of the territory's contribution to world affairs and the high esteem in which it is held have indeed been displayed through its admittance as a member of key international organizations and as a party to multinational conventions.[25] The international community's interest in sustaining Hong Kong's international status has been more recently reaffirmed in the arrangements for continued membership for the HKSAR.[26] Thus, if the Holy See's international personality is grounded in its religious and spiritual authority, the territory's claim to international personality may arguably be based on its prominent economic position.

Right to Self Determination

Perhaps more controversial is Hong Kong's claim to international personality by virtue of the right to self determination. While international legal documents endorse the right of "all" peoples to determine freely their political status, in practice the right to self determination appears to have been confined to "colonial" peoples.[27] An assertion of a right to self determination on behalf of the inhabitants of Hong Kong would, thus, hinge to a large extent on establishing their position as the population of a "non-governing [colonial] territory" within the terms of the United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples.[28] As such, they are entitled not only to the "transfer of all powers . . . without any conditions or reservations, in accordance with their freely expressed will and desire . . ."[29] but to enjoy a "separate and distinct status" even prior to the actual transfer.[30]

That Hong Kong came into being and has functioned as a British

Crown colony since 1842 is not subject to dispute. Under the Treaty of Nanking,[31] the island of Hong Kong was ceded to Great Britain in perpetuity. Stonecutters Island and the southern part of the Kowloon Peninsula were similarly ceded to the British in 1860 under the Peking Convention,[32] and in 1898 the New Territories were leased to Britain for ninety-nine years.[33] By means of recognized constitutional devices—Letters Patent and Orders in Council—the various parts forming the territory of Hong Kong have been brought under British administration.[34]

Hong Kong's colonial status received a certain international "acknowledgement" when it was placed on the agenda of a newly established Special Committee on Decolonization in 1961. Yet, the Government of the People's Republic of China [PRC] has consistently maintained that the three treaties relating to Hong Kong are "unequal treaties"[35]—and, hence, not binding upon China—and that Hong Kong is, therefore, part of Chinese territory. Consequently, it requested the removal of Hong Kong from the colonial territories listed by the United Nations under the Declaration on the Granting of Independence to Colonial Territories and Peoples.[36] The PRC's request was granted.[37] For what appear to be political and pragmatic reasons,[38] Britain did not protest the decision, although in a subsequent letter the UK's Permanent Representative to the UN informed the Secretary General that the action of the General Assembly "in no way affects the legal status of Hong Kong."[39]

Indeed, notwithstanding its approval, the Chinese request—based as it was on the invalidity of the "unequal treaties" relating to Hong Kong—can find no support in international law and practice.[40] As noted by one commentator, the Sino-British transactions over Hong Kong were all "valid transfers of territory according to the law, practice and values of that time. It was an age when territories changed hands as if they were private property. Occupation, conquest, sale, or lease gave good title to a sovereign intent on establishing an empire."[41] Nor would the "Hong Kong treaties" be regarded as "unequal" under current rules of international law as expressed in the Vienna Convention on the Law of Treaties,[42] the application of which is in any event precluded by virtue of the principle of nonretroactivity contained therein.[43] It has additionally been argued that, given the specific circumstances of its adoption, the decision to delete Hong Kong from the agenda of the Special Committee on Decolonization was a procedural one and did not preclude the restoration of Hong Kong to the agenda "if and when any initiative is taken in that direction."[44]

The colonial status of the territory having thus remained unchanged and pending an exercise of self determination, the inhabitants of Hong Kong may insist on a distinct and separate personality as provided in UN resolutions[45] and affirmed by international juridical authority.[46] Alternatively, they may rely on their right as a "people" in the context of a world community that is increasingly embracing human rights, minority rights, and indigenous rights. In establishing their case,[47] Hong Kongers would emphasize their cohesiveness as a national group with an independent purpose, its own system of laws, a unique cultural identity,[48] a clearly defined territory, and an effective government playing an active role in the world economy.

Evidently, "nationhood" for Hong Kong has not been accepted by the PRC which, emphasizing the principle of national unity and territorial integrity, appears to consider the recovery of sovereignty over Hong Kong as the exercise of the right of self determination by the entire Chinese people.[49] Yet, a rejection by the PRC of self determination for Hong Kong people need not preclude a claim to a separate international juridical personality. The Chinese—who have been ardent proponents of the right to self determination[50]—have taken such a right to mean essentially liberation (= independence and secession) of non-self-governing peoples from colonial or racist domination and foreign occupation.[51] A more limited claim to "selfhood" or "personhood" that does not impair the integrity or the organic structure of the state or injure its vital interests may find China's endorsement.[52]

The UK's commitment to the right of self determination—in general and in relation to the non-self-governing territories for which it is responsible in particular—has been restated on numerous occasions.[53] The fact that the territory's inhabitants qualify as a "people" is also consistent with the British "working definition or rule of thumb," attaching importance to "whether the people in a particular territory constitute a settled and self sustaining community with its own institutions and civil administration."[54] For obvious political reasons (aimed essentially at minimizing friction with the PRC and accommodating the latter's "reasonable" demands), self determination for Hong Kong has not been urged by the UK government. Given, however, its explicit policy of non-intervention in local affairs and the active promotion of a high degree of autonomy for the territory, London, in all likelihood, would support Hong Kong's claim to international personality as a "people."

Insofar as the rest of the international community is concerned, while the probability of a collective UN finding that Hong Kongers have a right

to self determination is rather low (in view of relevant UN practice[55] and the difficulties in establishing a case based on colonial or alien domination[56]), the wide acceptance of the principle may, nonetheless, prompt countries to recognize the territory's separate international identity.

Concluding Observations Regarding International Legal Personality for Hong Kong

In light of the relative and open-texture nature of the concept of international personality, it appears essential to focus upon the international capacity which the entity in fact possesses (capacity being the key to international personality[57]) and to disregard preconceptions as to who can be subjects of international law. The test should be a functional one—whether and to what extent the entity is able to operate as a member of the international community.

It is instructive in this connection that international organizations have adopted a "functionalist" approach in relation to admission of members. An entity's eligibility depends, thus, on its ability to carry out the essential obligations of membership rather than meet traditional requirements of statehood. Several examples may, in fact, be cited of admission by international organizations of non-states, despite "state" requirements in their constituent instruments.[58] Constitutions of some specialized agencies contain provisions to the effect that territories or groups of territories which are not responsible for the conduct of their international relations may be admitted as associate members.[59]

Hong Kong has both the *de jure* and *de facto* capacity for independent action involving reciprocal rights and duties. Clearly, the many regional and international organizations that have approved its affiliation consider Hong Kong to possess such a capacity. An international personality is a logical deduction from the considerable powers enjoyed by Hong Kong for action in the international sphere.

An argument may also be put forward that effective control over population living in a given territory is a key factor in "eligibility for membership in the world community at large." According to one expert, liberation movements, for example, have been elevated to the rank of international subjects mainly because they tend (or at least strive) to acquire control over territory.[60] Effectiveness, moreover, takes precedence over recognition.[61]

Hong Kong has the control apparatus—as well as the political, technical, and financial capabilities—for putting into effect international rights and duties and coming into contact with other international legal

persons. It has also acquired a respectable measure of recognition as a viable and significant international political actor with ample capacity to operate internationally.

From a broad legal standpoint, several developments in international law and practice should facilitate the acceptance by the international community of Hong Kong's status as an international person. Generally, the notion of sovereignty seems to be undergoing an erosion. Sovereigns are, in fact, unable to manage singlehandedly many contemporary problems whose ramifications extend beyond national frontiers (for example, pollution). Developments in science and technology have also forced states to concede powers to international regulatory groups (for example, international communication, maritime traffic, use of airspace). Another factor undermining the traditional notion of sovereignty is the emergence of regional entities wielding control over numerous areas previously within the exclusive domain of individual states (for example, economy—EC;[62] defense and military strategy—ASEAN). Regional and international organizations increasingly enjoy some of the powers previously exercised by states. In theory, at least, most countries would not be unwilling to surrender sovereignty in certain areas (for example, health, international communication). Nor is there a strong fear of domination by one or two countries as military force is no longer the sole basis of power. Indeed, economic power in the international marketplace (such as enjoyed, for example, by multinational corporations) is occasionally viewed as of greater significance than military strength. The development of international human rights law[63] has also meant that sovereign states can no longer erect barriers (in the name of domestic jurisdiction) and are required to subordinate their acknowledged power to internationally recognized rights of individuals and to subject themselves to international scrutiny and judgment (and perhaps "humanitarian intervention").

As a final observation on changing perceptions of world powers, there is little doubt that some of the structural underpinnings of the world order in the post-war era are assuming a less solid form, as witnessed by recent events in the Soviet Union and Eastern Europe. *Perestroika* and *glasnost* may represent only the beginning of a much more fundamental development signalling the erosion of the position of the state as the central actor in the international community.[64] There is arguably a trend toward granting non-state actors an increasingly prominent role in shaping legal norms that will order and maintain the international community of the future (particularly, in the areas of human rights and the envi-

ronment). It is clear in any event that in today's integrated and functionally complex international system, states are not the only or even the major players. Indeed, on a theoretical level international law has been redefined[65] and adjusted[66] to take account of the growing importance of entities of a non-territorial nature and no longer reflects the now unworkable proposition that the regulation of interstate relations is its exclusive concern.

Apart from the general waning of sovereignty, it is also evident that states are prepared in practice to admit into the international legal system a broad range of less-than-sovereign entities. Recognition as international persons has been accorded to composite configurations—incorporated (such as real unions, federations, or international organizations) or unincorporated (such as Guam, Netherland Antilles, U.S. Virgin Islands), federal or "associated" (for example, Cook Islands, Niue, Puerto Rico, Toklau) states, protectorates,[67] colonies,[68] mandated or trust territories,[69] "internationalized" territories, as well as a variety of *sui generis* entities, including governments in exile (e.g., Cambodia), belligerent or insurgent communities (e.g., Eritrean nationalists), representative organizations (e.g., PLO, SWAPO), historical bodies (e.g., Order of St. John) and religious institutions (e.g., the Holy See). Legal capacity has also been extended to individuals under various treaties and customary international law. Legitimate expectations have thus been created for granting similar recognition to autonomous regions that enjoy a particularly high degree of international exposure, such as Hong Kong.

Since claims to international personality are to be assessed in light of the societal needs of the international community,[70] in acknowledging the considerable capacities possessed by Hong Kong (and later by the HKSAR), regard must be paid also to the useful international functions performed by the territory. Arguably, the Hong Kong model of autonomy, if faithfully executed, may be regarded as partial implementation of self determination based upon a compromise between conflicting interests. As such, it would not only be congruous with one of the main political aims of the community of nations but may be viewed also as a viable alternative to secession and the proliferation of mini-states,[71] as well as a pragmatic peaceful means of dispute resolution. The nature of the regime promoted in the territory and envisaged for the special region is also associated with certain principles, such as rule of law, which are highly valued by liberal societies in the world. To secure these important ends—and also minimize international disruption (for example, mass exodus of people)—Hong Kong must be able to operate independently and on the

basis of relative equality with other subjects in the international legal order, that is, as an international person.

As noted at the outset, however, international personality is a flexible and open-ended concept which may mean different things in different circumstances. While states possess the fullest measure of international personality, international organizations are endowed with the degree of personality that enables them to discharge effectively their functions. The extent of personality enjoyed by other subjects of international law will depend on various factors, including a constituent treaty, constitution, and recognition. To establish the international legal status of Hong Kong, it is necessary, therefore, to determine the substantive entitlements and responsibilities that are attached to entities with similar standing, as well as to examine Hong Kong's actual position.

Notes and References

1. International personality denotes a capacity to enter into legal relations in the international arena and to create the consequent rights and duties attached to that capacity. Entities which are deemed under international law to possess international legal personality are the "subjects" of international law, although not all subjects are endowed with the same degree of legal personality.

2. As observed by the International Court of Justice in its Advisory Opinion on the *Reparations for Injuries Suffered in the Service of the United Nations*, "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life...." (1949) ICJ Reports 178.

3. J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979), p. 31.

4. 165 L.N.T.S. 19.

5. For the demarcated boundaries of Hong Kong, see Interpretation and General Clauses Ordinance, Cap.1 *Laws of Hong Kong* [*LHK*], 1989 ed.

6. See *Achievements of the Joint Liaison Group and its Sub-Group on International Rights and Obligations (1985-May 1990)*, (Hong Kong: Government Printer, 1990), for a list which includes the UN Economic and Social Commission for Asia and the Pacific (ECOSOC); International Bank for Reconstruction and Development (IBRD); International Monetary Fund (IMF); UN Conference on Trade and Development (UNCTAD); World Health Organization (WHO); UN Commission on Narcotic Drugs (UNCND); Food and Agriculture Organization (FAO); International Labour Organization (ILO); International Maritime Organization (IMO); Universal Postal Union (UPU); International Telecommunication Union (ITU); International Telecommunications Satellite Organization (INTELSAT); International Atomic Energy Agency (IAEA); and International Criminal Police Organization (INTERPOL).

7. Most importantly, the 1947 General Agreement on Tariffs and Trade (GATT), ibid. It may be interesting to note that while the EEC countries are represented by one person in GATT negotiations (i.e., no separate representation from the UK and other European countries), Hong Kong has its own representative, giving expression to an independent economic policy.

8. For example, Arrangements Regarding International Trade in Textiles (MFA), 20 Dec. 1973, Misc. 18, UK Command Papers 6205; indexed in *Multilateral Treaties: Index and Current Status*, M.J. Bowman and D.J. Harris (London: Butterworths, 1984), No. 209; and Agreement with the Government of Guandong on the Supply of Water, Water Supplies Department, Fact Sheet 1985. Negotiation of separate air services agreements and the establishment of Hong Kong's autonomous shipping register are also being contemplated.

9. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, (1985) U.K.T.S. 26, Cmnd. 9543 [hereafter: Sino-British Joint Declaration].

10. Ibid., Annex I, sec. VI, para. 3. Agreements have been reached to secure Hong Kong's continued participation after 1997 in a wide range of international organizations and conventions. See *Achievements of the Joint Liaison Group.*

11. Sino-British Joint Declaration, Annex I, sec. XI, para. 1.

12. Ibid., secs. VII, XIV and XI, respectively.

13. I.e., the act of recognition establishes ("constitutes") the international personality of the entity in question.

14. I.e., recognition is only a formal acknowledgement of an already existing state of circumstances, indicating basically the willingness of the state to treat the entity as an international person.

15. For a recent analysis of the debate and its practical implications, see *S v. banda and Others*, Bophuthatswana, Supreme Court 6 February 1989, repr. in (1990) 82 ILR 388. After a thorough examination of the authorities and a careful evaluation of the relative merits of the constitutive and declaratory theories, Friedman J concluded (listing fourteen reasons) that the declaratory view is the "more valid and acceptable one."

16. They have indicated, in effect, their acceptance of Hong Kong's authority to enter into international agreements or join international organizations and assumed Hong Kong's intention to be responsible for its international acts without recourse to any other government (British or Chinese).

17. See *Reparations for Injuries Suffered in the Service of the United Nations.*

18. The concept has no legal meaning as such and is used to describe cases which vary considerably in nature and extent. The analogy here focuses on the aspect of creation of status by an international treaty, subject in any event to the proviso that each entity must be examined for its distinct characteristics.

19. J.K. Bleimaier, "The Legal Status of the Free City of Danzig 1920-1939: Lessons to be Derived from the Experiences of a Non-State Entity in the International Community," (1988) Hague Y B Int'l L 69, 70.

20. Danzig's separate international personality was reaffirmed by the Permanent Court of International Justice on several occasions: *Jurisdiction of the Courts of Danzig* (1928) PCIJ, Ser. B, No. 15, p. 17 [the Court emphasized that the enforced Treaty of Paris of 9 Nov. 1920 between Danzig and Poland was "an international agreement governed by international law"]; Advisory Opinion on the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (1931) PCIJ Ser. A/B, No. 44, pp. 23-24 [in the Court's opinion, ordinary rules governing relations between states and general principles of international law were applicable to the relations between Danzig and Poland].

21. G. Ress, "The Hong Kong Agreement and Its Impact on International Law" in *Hong Kong, A Chinese and International Concern*, eds. J. Domes and Yu-ming Shaw (Boulder & London: Westview Press, 1988), p. 129 at p. 150.

22. Sino-British Joint Declaration, Art. 3(1).

23. It may be noted in this connection that the Sino-British Joint Declaration has been received with much rhetorical approval from members of the international community.

24. See *Foreign Affairs Report on Hong Kong* (London: HMSO, 1990); Cmnd. 1047.

25. See *supra* (note 6).

26. Ibid.

27. See H. Hannum, *Autonomy, Sovereignty and Self Determination* (Philadelphia: Univ. of Pennsylvania Press, 1990), p. 46.

28. G.A. Res. 1514 (XV), 15 UN GAOR Supp. (No. 16) 66.

29. Ibid.

30. See 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), 24 October 1970.

31. Treaty of Peace, Friendship, Commerce and Indemnity Great Britain-China, 29 August 1842, repr. in *Constitutions of Dependencies and Special Sovereignties*, eds. A.P. Blaustein and P.M. Blaustein (Dobbs Ferry, NY: Oceana, 1985), v.5, p. 21.

32. Convention of Peace and Friendship Between Great Britain and China, signed at Peking on 24 October 1860, ibid.

33. Ibid.

34. See Charter for Erecting the Island of Hong Kong into a Separate Colony and for Providing for the Government Thereof, 5 April 1843, Letters Patent, ibid., p. 22; Order in Council Providing for the Administration of the Territories Adjacent to Hong Kong Acquired by Her Majesty Under the Anglo-Chinese Convention of 24 October 1860, ibid.,

p. 27. By Order in Council of 20 October 1898 and Order in Council of 27 December 1899, the leased territories were declared to be part and parcel of the Colony of Hong Kong.

35. See P. Wesley-Smith, *Unequal Treaty 1898-1997: China, Great Britain and Hong Kong's New Territories* (Hong Kong: Oxford Univ. Press, 1980), pp. 162-63, 167-68, 185-87.

36. See Letter of 10 March 1972 from the Chinese delegate, Huang Hu, to the UN Committee on Decolonization, repr. in *People's China and International Law: A Documentary Study*, eds. J. Cohen and H. Chiu (New Jersey: Princeton Univ. Press, 1974), p. 384. The content of Hu's letter was as follows:

> As it is known to all, the questions of Hong Kong and Macao belong to the category of questions resulting from a series of unequal treaties left over by history, treaties which the imperialists imposed on China.
>
> Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions of Hong Kong and Macao is entirely within China's sovereign right and does not fall under the category of colonial territories.
>
> Consequently, they should not be included in the list of colonial territories covered by the declaration on the granting of independence to colonial countries and peoples.
>
> With regard to the questions of Hong Kong and Macao, the Chinese government has consistently held that they should be settled in an appropriate way when conditions are ripe. The United Nations has no right to discuss these questions....

37. See G.A. Res. 2978 (XXVII) of 2 November 1972, 27 UN GAOR Supp. (No. 30) 80, UN Doc. A/8730 (1972).

38. See N. Jayawickrama, "The Right of Self Determination," in *The Basic Law*, ed. R. Wacks (Hong Kong: Univ. of Hong Kong, 1990), p. 85 at pp. 92-93.

39. Cited ibid.

40. See H. Chiu, "Comparison of Nationalist and Communist Chinese Views of Unequal Treaties" in *China's Practice of International Law*, ed. J. Cohen (Cambridge, MA: Harvard Univ. Press, 1972), p. 241 at p. 267; and S. Leng, "The Sino-Soviet Dispute" in *Law in Chinese Foreign Policy: Communist China and Selected Problems of International Law*, eds. S. Leng and H. Chiu (Dobbs Ferry, NY: Oceana, 1972), p. 263 at p. 279, n.47 (lists cases of acceptance by the Chinese themselves of the validity of treaties which might be deemed "unequal").

41. Jayawickrama, "The Right of Self Determination," p. 90.

42. UN Doc. A/CONF. 39/27, repr. in (1969) 8 ILM 679.

43. Art. 4, ibid.

44. See Jayawickrama, "The Right of Self Determination," pp. 91-93.

45. See, for example, G.A. Res. 2625 of 1970, *supra* (note 30), which stipulates that "[t]he territory of a colony has a status separate and distinct from the territory of the state administering it, and such separate and distinct status exists until the people of the colony have exercised their right of self determination."

46. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (1971) ICJ Rep. 16.

47. See Comment, "Self Determination in Hong Kong: A New Challenge to an Old Doctrine" (1985) 22 San Diego Law Review 839, 853-4 (arguing that Hong Kong is a "prime candidate for self determination"); P. Wesley-Smith, "Settlement of the Question of Hong Kong" (1987) 17 Calif.W.Int'L.J. 116, 117-9 (lists factors supporting a claim by Hong Kong people for self determination); Jayawickrama, "The Right of Self Determination," p. 94 (contending that Hong Kong is a "nation").

48. For an analysis of Hong Kong identity, see S.-K. Lau and H.-C. Kuan, *The Ethos of the Hong Kong Chinese* (Hong Kong: The Chinese Univ. Press, 1988).

49. See Sino-British Joint Declaration, Art. 1: "The Government of the People's Republic of China declares that to recover the Hong Kong area (including Hong Kong island, Kowloon and the New Territories, hereafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997."

50. See statement on combatting racism and the right to self determination by the Chinese Ambassador, Ding Yuanhong, at the UN Third Committee, 7th mtg., 13 October 1989, pp. 6-7, UN G.A. 44th Sess., Official Records.

51. See A. Cassesse, "Political Self Determination—Old Concepts and New Developments" in *UN Law/Fundamental Rights*, ed. A. Cassesse (Alphen aa den Rijn: Sijthoff & Noordhoff, 1979) p. 137 at p. 140.

52. The notion of one country/two systems, as reflected in the Sino-British Joint Declaration, can be said to imply such support.

53. See (1983) 54 BYIL 396-409; (1984) 55 BYIL 430-7; (1985) 56 BYIL 394-406; (1986) 57 BYIL 514-17; (1987) 58 BYIL 519-22; (1988) 59 BYIL 441-3.

54. See Sir Ian Sinclair, Legal Adviser, Foreign and Commonwealth Office, in the course of evidence to the Foreign Affairs Committee of the House of Commons on 17 January 1983, as repr. in (1983) 54 BYIL 394-400.

55. The practice in question relates to cases involving strong objections and counter claims by powerful neighbouring states, e.g., Goa, East Timor, Ifni, Gibraltar and the Falklands. See M. Pomerance, "Self Determination Today: The Metamorphosis of an Ideal" (1984) 19 Israel Law Review 310, 322-3.

56. It is not clear—even in the light of recent events in Eastern Europe and the Baltics—that communist rule may be regarded as "alien" domination.

57. See in this connection D.P. O'Connel, *International Law*, 2nd ed. (London: Stevens & Sons, 1970), v. I, pp. 283-84, who maintains that "even the smallest measure of international capacity is the index of personality, and so it is incorrect to exclude subordinate entities like colonies or member States of federations from the conception of statehood in international law without previous reference to international legal acts which they may in fact perform."

58. As noted by J. Dugard, six of the UN's original members (India, the Philippines, Lebanon, Syria, Byelorussia, and the Ukraine) were not fully independent (the latter two not even putative) states in 1945. See his, *Recognition and the United Nations* (Cambridge: Grotius Publications, 1987), pp. 60-74. Dugard further argues that some subsequent members were not yet states as a matter of customary international law when they were admitted; pre-independent Namibia, represented by the UN Council for Namibia, was admitted as a full member of the International Labour Organization. See also M.W. Reisman's discussion of the UN's membership policy which plays down resource base and sovereign independence. Examples from the 1960s are numerous. In the 1970s, the admission of the tiny landlocked Himalayan Kingdom of Bhutan is an obvious case. As Reisman remarks, "[n]o one in the UN entertained any illusion about the immediate or prospective degree of effective independence from surrounding India." See his, *Puerto Rico and the International Process* (Washington: West Publishing, 1975), pp. 60-62.

59. See for example FAO - Art. II, 3; UNESCO - Art. II, 3; WHO - Art. 8; ITU - Art. 1, 3(b); IMO - Arts. 8-9. The World Meteorological Organization provides in Art. 3 (d)(e) that any territory or group of territories maintaining its own meteorological service can become a "regular member" of the organization.

60. A. Cassesse, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), p. 91.

61. Ibid., pp. 78-9.

62. It is arguable that to the extent economics and politics are interdependent, economic unification involves political integration as well. As observed by one commentator, in Europe "international borders are becoming increasingly less relevant, and extensive informal and limited formal transborder cooperation is becoming the norm." H. Hannum, "The Foreign Affairs Power of Autonomous Regimes" (1988) 57 Nordic J.Int'l L. 273, 287.

63. Most nations of the world have now signed one or more of the international instruments obligating states to respect human rights. See *Human Rights: A Compilation of International Instruments*, UN Doc. ST/HR/1/Rev.2 (1983).

64. Falk predicts the break-up of the state-centred system of international relations and the emergence of new forms of "non territorial central guidance" and "communitarian organization." R. Falk, *Revitalizing International Law* (Iowa: Iowa State Univ. Press, 1989), pp. 5, 10.

65. See, for example, the definition advanced by J.G. Starke, *Introduction to International Law*, 10th ed. (London: Butterworths, 1989), p. 3:

> that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe in their relations with each other and which incudes also a. the rules of law relating to the functioning of international institutions or organizations, their relations with each other, and their relations with states and individuals; and b. certain rules of law relating to individuals and non-state entities so far as the rights and duties of such individuals and non-state entities are the concern of the international community.

66. In line with its changing orientation towards being a "law of economic, social, cultural, technical and civilizing cooperation, sometimes even integration and subordi-

nation, which aims at regulating problems of development, human rights, communication and traffic, environment, education, labour, science and technology, nutrition and health, resources and energy" (as distinct from an inter-state law of peaceful coexistence). L. Wildhaber, "Sovereignty and International Law" in *The Structure and Process of International Law*, eds. R. St.J. Macdonald and D.M. Johnston (Dordrecht: Martinus Nijhoff, 1983), p. 425.

67. L.C. Green, *International Law: A Canadian Perspective*, 2nd ed. (Toronto: Carswell Co., 1988), p. 104, cites the *Ionian Ships Case* in which it was held that a declaration of war by the protecting power was not sufficient to render the protectorate "at war." A separate declaration to this effect would be needed.

68. See 1970 Declaration on Principles of International Law, G.A. Res. 2625 (XXV), which provides that "[t]he territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the State administering it...."

69. See *International Status of South West Africa Case* (1950) ICJ Rep. 128. The Court advised that South West Africa was a territory under an international mandate whose status could only be modified with the consent of the UN, but at the same time it constituted a new species of international government which does not fit into the old conception of sovereignty and which was alien to it. A more categorical statement was made in a later advisory opinion in the South West Africa cases: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* [*supra*, note 46], by Judge Ammoun who asserted that "Namibia, even at the periods when it had been reduced to the status of a German colony or was subject to the South Africa Mandate, possessed a legal personality which was denied to it only by the law now obsolete.... It nevertheless constituted a subject of law...possessing national sovereignty but lacking the exercise thereof.... Sovereignty...did not cease to belong to the people subject to mandate. It had simply, for a time, been rendered inarticulate and deprived of freedom of expression."

70. For a discussion of the "international end" or "societal need" theory, see T. Maluwa, "The Holy See and the Concept of International Legal Personality: Some Reflections" (1986) XIX CILSA 1-26. It is the writer's thesis that such a theory provides the legal and philosophical justification for according international legal personality to certain types of non-state entities.

71. See R. Lapidoth, "Some Reflections on Autonomy" in *Melanges Offrets à Paul Reuter* (Editions A Pedone, 1981), pp. 379-89.

Canada and Hong Kong: Coming and Going under Immigration and Refugee Law

William H. Angus

Introduction

Between 1980 and 1990, immigration to Canada from Hong Kong increased from 6,309 to 27,143 persons annually, and from a ranking of fifth to first in source countries for Canadian immigration.[1] From the Hong Kong perspective, Canada has become the leading host country for its emigrants, receiving approximately half each year since 1987.[2]

Obviously this rise to prominence of Hong Kong as Canada's leading source of immigrants is of considerable importance to one of the few remaining nations actively searching for newcomers to augment its relatively small population spread over a vast geographical territory. Correspondingly, inhabitants of Hong Kong have shown a distinct enthusiasm for relocating to Canada, in light of the uncertainties of political change to be implemented in 1997.[3] Therefore, both jurisdictions have a substantial interest in Canadian immigration policy, law, and practice.

With respect to refugees, Canada has a distinguished record for receiving refugees from various corners of the globe, and was awarded the Nansen Medal by the UNHCR in 1986 for its endeavours.[4] Hong Kong is, of course, in the difficult situation of being the chosen jurisdiction of first refuge for tens of thousands of Vietnamese refugee claimants. Canada has resettled substantial numbers of them to this point. But what will become of those claimants who are not resettled or returned before 1997? Furthermore, there is the troubling spectre that in 1997 and thereafter, residents of Hong Kong themselves may seek to leave and make Convention refugee claims in Canada and elsewhere.

This paper will look at the foregoing issues largely from a Canadian perspective, but will endeavour to raise broader questions and issues where appropriate.[5]

Annual Levels of Canadian Immigration

For one hundred years from the first *Immigration Act* in 1869, Canadian immigration law and policy had been very much a matter of *ad hoc* discretionary decision-making.[6] However, in the 1960s and early 1970s, widespread dissatisfaction with the existing process gave rise to public desire

for a more planned approach. A series of broadly based research papers and nationwide hearings preceded a complete overhaul of Canadian immigration legislation in the *Immigration Act, 1976*, which went into force in mid-1978.[7]

One of the most significant developments in the 1976 Act was a requirement that the Minister responsible for immigration, after consultation with the provinces and others, should present an annual report to Parliament by the first of November each year, setting forth the number of immigrants deemed appropriate for a specified future period of time and the demographic considerations relating thereto.[8] Although this setting of levels for the future is not a prescription of quotas for immigrants from specific countries, it does permit consideration of various contingent situations which may arise. It is from this general picture of future levels that the flow of immigrants to Canada from Hong Kong, before and after 1997, will be governed.

Canadian Immigration Plan for 1991-1995

Although the 1976 Act did not specify the time frame for which immigration levels are to be set, the annual reporting requirement quite naturally gave rise to projections for the following calendar year only. This was the practice until November 1990. In the two year period leading up to that date, however, a major re-evaluation of admissions policy was undertaken by the Canadian government. The result was a five year immigration plan for 1991 to 1995 which proposed major changes in direction, some of which have already been implemented.[9]

As this five year period sets the stage for admissions policy in most of the years leading up to 1997, it is obviously of considerable importance for emigration from Hong Kong to Canada. The following chart on page 33 provides the bare bones of the 1991-1995 plan as reported to Parliament in November 1990.[10]

In establishing the 1991-1995 plan, three basic approaches were available: first, immigration levels could have been maintained at the relatively low levels of the 1980s; second, they could have been increased moderately; third, major increases could have been planned. Both the first and third choices were eventually ruled out, the first mainly for demographic reasons and the third because of unacceptable strains on settlement resources and the absorption of large numbers. Thus, the middle road more or less won by default.

Despite the current economic recession in Canada, which might have aroused widespread opposition to the 1990-91 plan on the ground that

COMPONENT	ESTIMATED 1990	PLANNED 1991	1992	1993	1994	1995
FAMILY CLASS	72,500	80,000	100,000	95,000	85,000	85,000
REFUGEES						
Government-assisted Refugees & Members of Designated Classes (selected abroad)	13,000	13,000	13,000	13,000	13,000	13,000
Privately sponsored refugees & members of Designated Classes (selected abroad)	24,000	23,500	20,000	20,000	15,000	15,000
Refugees landed in Canada (after 1 January 1989)	5,000	10,000	25,000	25,000	25,000	25,000
INDEPENDENT IMMIGRANTS						
principal applicants	19,500	20,000	21,500	22,500	29,000	29,000
spouses and other accompanying dependents	25,500	21,000	20,000	25,000	33,000	33,000
ASSISTED RELATIVES						
principal applicants	7,000	7,000	7,000	8,500	11,500	11,500
spouses and other accompanying dependents	11,000	12,500	12,500	15,000	19,000	19,000
BUSINESS IMMIGRANTS						
Principal applicants	5,000	7,000	7,000	6,500	5,000	5,000
spouses and other accompanying dependents	13,500	21,000	21,000	19,500	14,500	14,500
RETIREES	4,000	5,000	3,000	0	0	0
TOTAL	200,000	220,000	250,000	250,000	250,000	250,000

CHART 1: THE 1991–1995 IMMIGRATION PLAN

additional immigrants would threaten already limited employment for Canadians by providing more competition for fewer jobs, the five year plan was greeted by widespread acclaim, a most unusual reaction to any public pronouncement in Canada.[11] In these circumstances, this paper will next consider the various options open to prospective emigrants from Hong Kong to Canada under the 1991-1995 plan.

Skilled Workers

Since the late 1960s, applications to immigrate to Canada by skilled workers have been assessed by a points system whose factors presently include education, vocational preparation, experience, occupational demand, arranged employment or designated occupation, demography, age, knowledge of English and French languages, and personal suitability.[12]

As the basic component of the independent immigrant class, skilled workers are highly regarded in the 1991-1995 plan on the ground that their skills would make a valuable contribution to national and regional economic development, and particularly to the competitive position of Canadian business and industry. Consequently, an immediate increase in their numbers was proposed, to be followed by further annual expansion to 9,500 skilled immigrants by 1994.

Furthermore, the occupational demand factor in the points system has now been revamped to provide a "designated list" for individual provinces which have specific occupational needs.[13] Applicants who fall within the occupational titles on the designated list and who are willing to settle in the particular province receive additional points toward the required minimum for acceptance as a skilled worker. In addition, there is a "general list" which prescribes a given number of points depending on the particular occupation. If an applicant does not acquire at least one point for occupational demand, the issuance of an immigrant visa is prohibited unless the applicant has arranged employment in Canada.[14]

From the perspective of Hong Kong residents wishing to emigrate to Canada, many will qualify as skilled workers by having the required number of points, provided that their occupations fall within either the designated or the general list. However, there will be many others whose qualifications in terms of total points and the occupation factor will not meet the requirements. Overall, prospective Hong Kong emigrants would appear to be in a relatively favourable situation insofar as the large pool of highly educated, experienced, and trained workers in Hong Kong is concerned.

Business Immigrants

In 1980 business immigrants from Hong Kong to Canada numbered only thirty-three, and Hong Kong ranked a poor fifth in source countries, behind the United States, United Kingdom, West Germany, and France.[15] However, in 1983 and 1984 the Hong Kong numbers increased dramatically to 338 and 604, respectively, achieving first place in 1984 by a wide margin over West Germany. From 1985 through 1988, Hong Kong remained at the top of the list, being the source of 1,106 out of a total of 3,954 business immigrants in the latter year. Thus, Hong Kong emerged in the mid-1980s as the leading source of business immigrants for Canada.

Nevertheless, business immigration from Hong Kong and other countries is not overly significant from the viewpoint of total immigration to Canada, although spouses and other accompanying dependants of business immigrants do add substantially to the overall numbers.[16] What is of importance to Canada, however, is the estimated CDN$3,427,979,000 brought at the time of entry or to be transferred later, by business immigrants issued visas in 1988[17] and presumably in the years since then.

From an estimated 5,000 business immigrants in 1990, the 1991-1995 Immigration Plan proposes an increase to 7,000 per annum for 1991 and 1992, but then a rather surprising decline to 6,500 in 1993 and 5,000 for both 1994 and 1995. Why would this be so, particularly when the present Federal and Provincial governments have been very favourably disposed to increased business immigration? One answer may be that the perceived economic benefits to Canada flowing from business immigration are not perfectly clear and may even be rather doubtful.[18] Another might be that Hong Kong will shortly cease to be a substantial source of business immigrants because qualified prospects will have already made arrangements to leave Hong Kong or will have left, in advance of mid-1997. Furthermore, some problems have emerged with respect to the business immigration programme, which will be mentioned hereafter, and it may have been thought prudent to proceed slowly.

Each of the three business classes—entrepreneur, investor, and self employed—will now be examined briefly.

Entrepreneur Class

Under this category, which first surfaced in the 1950s, a prior entrepreneurial track record is not mandated by the *Immigration Regulations*.[19] The applicant must intend and have the ability to establish, purchase, or make a substantial investment in a business or commercial venture in

Canada which will make "a significant contribution to the economy" and create an employment opportunity for at least one Canadian citizen or permanent resident. Obviously, smaller businesses and ventures are contemplated. Active and on-going participation in management of the Canadian business or venture is required.

Unfortunately, some entrepreneurs have been landed as permanent residents in Canada but have not established a business or commercial venture.[20] As a result, conditional landings were devised by the Immigration Commission whereby the entrepreneur immigrant is required to show that a business or venture meeting the prescribed requirements has been established within two years of arrival, in order for the condition to be removed.[21]

Overseeing the fulfilment of this condition has understandably not been an easy task for the Canadian Immigration Commission. Some of the businesses or ventures may be merely facades established solely for the purpose of satisfying the condition, following which they will be closed down or sold. Others are so marginal that it is questionable whether they can be regarded as a "significant contribution to the economy." Proceedings for removal from Canada have been taken against some entrepreneur immigrants who have not met the condition imposed on their admission.[22]

Although abuse of the entrepreneur category has resulted in a tightening up of its administration, it remains as one of the most attractive possibilities for Hong Kong emigrants with a business background.

Investor Class

This category was introduced by the present Canadian government in 1986 as a natural outgrowth from the entrepreneur class. A number of regulatory changes in the programme have since occurred, the latest being in December of 1990,[23] and frequent amendments or clarifications by policy statements and interpretive bulletins are common in what might be described as coping with the growing pains of a new endeavour.

To be an investor does not require active involvement of the immigrant in a Canadian business or venture as is the situation for an entrepreneur, but successful operation, control, or direction of a business or commercial undertaking in the past is necessary. In addition, the investor must make a minimum investment of $250,000, $350,000 or $500,000 for five years under a three-tiered system based on the number of business immigrants in a prior given year. Bilateral agreements between the Federal and Provincial governments provide for joint administration of immigrant

investor programmes in the particular provinces. Three types of investments are contemplated: an eligible business or commercial venture which does not exceed CDN$35 million in assets so that small and medium sized businesses will benefit, a privately administered investment syndicate, or a government administered venture capital fund.

Perhaps not surprisingly for a new scheme, some problems have cropped up along the way. Although the investor class was designed to attract risk capital, this goal was substantially undermined when some provinces permitted guaranteed investments. The rate of return offered by the approved investment funds has generally been low and would not ordinarily attract risk capital. Supervision and enforcement of fund management has proved to be a difficult undertaking. The lock-in period for a number of early investors is about to expire, and some concern is being expressed as to the fate of their investments. In one situation, allegations have been made that an investment fund manager with close ties to the governing political party directed funds to corporations which he personally owned or controlled.[24] Finally, there is a negative public perception that someone can buy their way into Canada under the investor programme. So the investor programme is not trouble free, although both the Federal and Provincial governments are actively engaged in jointly addressing its problems on an ongoing basis.

Investor immigrants to Canada have increased in number from 87 in 1987 and 249 in 1988, to 541 in 1989.[25] Although as of 1990 only 41% of the approved investment offerings had been sold before their expiry, over $900 million had been subscribed.[26]

In 1988, 43% of investor programme applicants were from Hong Kong,[27] and it is probably safe to assume that this investor interest from the territory has continued, notwithstanding problems associated with the programme.[28] Nevertheless, the size of the investment minimums and other requirements of the investor category will enable only relatively few in Hong Kong to immigrate to Canada under its provisions.

Self Employed Class

This class is designed to accommodate individuals who might make a positive contribution to the Canadian economy or its cultural and artistic life. Examples of those who might qualify include farmers, artisans, sports personalities, and operators of small outlets which individual communities in Canada may need.[29] However, relatively few persons immigrate to Canada under this class. One reason may be its minimum point requirement of 70 units which equals that of a selected worker. An

extra 30 units may be awarded if the applicant is considered able to become successfully established in Canada, which effectively reduces the required total to 40 units. Another reason may be a relatively narrow interpretation and application of the pertinent provisions by visa officers.

Although interest in the self employed category has increased of recent date,[30] it remains a relatively undeveloped area of business immigration which might offer favourable possibilities for Hong Kong residents who wish to emigrate in the years leading up to 1997.

Family Class

This term is defined in the *Immigration Regulations* essentially to cover a nuclear family of close relatives and a few others with a special relationship to the sponsor.[31] Most other relatives, including brothers and sisters, are consigned to the "assisted relative" class. It is very important for a relative to fall within the definition of the family class, and not the assisted relative category, because the fact of the family class relationship is basically all that is necessary for the applicant to be eligible for admission to Canada, provided that the sponsor is a Canadian resident and meets a low income cutoff level. This assumes, of course, that the sponsoree is not inadmissible by reason of a criminal conviction, medical condition, or on some other grounds listed in section 19 of the *Immigration Act.*

The 1991-1995 Immigration Plan projects a substantial increase in family class immigrants, from an estimated 72,500 in 1990 to a high of 100,000 in 1992, before tapering off to 85,000 in 1994 and 1995. An extension of the family class definition in 1988 to include never married sons and daughters of any age was rescinded recently, to be replaced with a concept of dependency for children under 19 years and those above that age who are in a position of economic reliance on their parents.[32] Beyond this of course, the family class projections for 1991-1995 reflect the earlier landing of permanent residents who then wish to sponsor their family class members.

It is unlikely that much will change between now and 1997 in terms of sponsorship of "members of the family class." Expansion of the definition would cut against the thrust of the 1991-1995 plan which favours more highly qualified immigrants and, therefore, is probably not likely. Some critics have even argued for a narrowing of the family class because it is not based on an assessment of qualitative factors as is required for skilled workers and other independent immigrants. However, no Canadian political party in its right mind would be willing

to risk the wrath of the large "immigrant" vote by such further restrictions.

Therefore, Canadian permanent residents and citizens from Hong Kong will most likely continue to be in the same situation as at present, insofar as sponsoring family class members. By and large, however, this is quite a favourable position. It includes top processing priority for family class applications and even a right of appeal in prescribed circumstances to the Immigration Appeal Division of the Immigration and Refugee Board.[33]

Assisted Relatives

Relatives not within the family class—including grandparents, aunts or uncles, brothers and sisters, sons or daughters, nieces, nephews, and grandchildren—were relegated in the *Immigration Regulations* to the less favoured "assisted" category. Unlike those within the family class definition, assisted relatives must satisfy points requirements similar to those imposed on independent immigrants, although bonus units are awarded depending on the degree of relationship.[34]

Like independent immigrants, assisted relatives must score at least one unit for both the experience and occupational demand factors of the point system. If they do not, an immigrant visa is not to be issued.[35] However, one possible avenue of entry for an assisted relative, who might not otherwise qualify, is to be sponsored by a Canadian citizen or permanent resident who owns and operates a family business, in order to occupy a position of trust in that business already established in Canada.[36]

In the 1991-1995 Immigration Plan, the number of assisted relatives is forecast as rising from an estimated 5,000 in 1990 to 11,500 in 1994 and 1995. This increase perhaps reflects the planned overall expansion in other immigrant categories which would thereafter give rise to applications from assisted relatives.

Nevertheless, prospective emigrants from Hong Kong who fall within the assisted relative class will probably continue to encounter difficulty with the one unit requirement for the experience and occupational demand factors. This will be disappointing for many who adhere to the concept of an extended family and maintain close family ties with those within the assisted relative definition.

Retired Persons

This category of self supporting individuals was retired as of 30 June 1991.

Canadian immigration policy had previously regarded them as desirable immigrants because they ordinarily brought substantial assets with them in excess of those required to support themselves and, thus, were of economic benefit to Canada, among other reasons. However, the numbers immigrating in this category had increased substantially in recent years, and it was thought preferable instead to favour skilled workers. As a result, retirees who applied before the 30 June 1991 deadline were to be processed through 1991 and 1992 at figures of 5,000 and 3,000, respectively, before disappearing from the scene in 1993.

Processing Visa Applications

In the late 1980s, the number of landed immigrants sometimes exceeded the annual level predicted by the Minister in the previous November, and in other years it came up short of the expected inflow. In order to avoid this element of unpredictability for the implementation of the 1991-1995 plan, procedures were contemplated[37] and have been initiated to manage the immigration process so that the specified levels are observed. Although the 1991-1995 plan reiterated the universality of Canadian immigration programmes so that all source countries will receive equal treatment,[38] obviously it would be impossible to stay within the target levels set annually if each visa office issued immigrant visas to all qualified applicants who appeared on the scene. As a result, visa posts now receive allocations which are not to be exceeded.

Insofar as Hong Kong is concerned, the fact that it has led all other source countries in the number of immigrants received by Canada in recent years suggests that the Hong Kong visa section is working reasonably effectively and that the present level of visas issued is regarded as satisfactory by the planners in Ottawa. Not every country is so fortunate. Many do not even have a Canadian visa office. There are only three for the whole of Africa, for example. In fact, one does not need to travel a great distance within Hong Kong to get to the Canadian visa office, compared to the geographical size of many other nations. So all in all, prospective immigrants in Hong Kong are quite well served in terms of available processing resources, although these may still be inadequate to meet the growing pressure of visa applications in Hong Kong.

A quick look at the most recent available statistics set forth in the *Immigration Manual* for April to June in 1990 reflects a heavy work load and lengthy processing times for Hong Kong, compared to other visa posts. For independent applications, Hong Kong was second only to Damascus in numbers (795 to 910), and its mean processing time was

second only to the one application in Moscow (583 days to 707 days). Damascus again topped the assisted relative class in numbers over second place Hong Kong (456 to 207), but Hong Kong was third place in mean processing time at 492 days, with Moscow leading at 504 and Manilla second at 496. Family class applications showed Hong Kong in fourth place (557), behind New Delhi at 1,318, Kingston at 861, and Manilla at 834. However, Hong Kong led these three in mean processing time with 440 days to 370, 268, and 350 for the others, respectively. Finally for business applications, the figures for Hong Kong were quite favourable, topping the list of processed applications by an enormous margin of 690 to 159 for Damascus, with Singapore third at 52 and the others straggling behind. Mean processing time for business applications in Hong Kong was 405 days, however, compared to 548 in New Delhi, 465 in New York, and 459 in Buffalo.

One might suggest that these figures indicate that the Hong Kong post is in need of even greater resources to cope with its heavy work load. In these days of fiscal spending restraint on the part of the Canadian government, however, it is very unlikely that substantial new resources will be made available for Hong Kong. There may be some limited shifting from posts in other countries, but that will not completely alleviate the situation. More hopeful are the recent processing changes in New Delhi for family class applications which were implemented in an effort to reduce the backlog and mean processing time there to 6 months.[39] Perhaps, something similar in Hong Kong would be feasible.

Special Measures

Officially at least, Canada has no plans to offer higher immigration "quotas" to residents of Hong Kong prior to 1997.[40] Of course, Canada does not formally have quotas for source countries, although allocations are made to overseas immigration posts for the issuance of visas. As discussed earlier, the statistics show that Hong Kong has fared very well in the volume of visas issued for immigration purposes. Yet, there seems to be an understandable and almost insatiable interest on the part of many Hong Kong inhabitants to emigrate to Canada before 1997, which far exceeds the present levels.

Could special measures of some sort be taken to enlarge the numbers? The answer is clearly "yes," provided that the political will is present in Canada. Perhaps, the most obvious route would be to place the people of Hong Kong in a "designated class" by regulation whereby they could receive preferential treatment. Canada has previous experience with

designated class regulations, namely the Indochinese Designated Class Regulations covering persons from Kampuchea, Laos, and Vietnam; the Political Prisoners and Oppressed Persons Designated Class Regulations dealing with persons from Chile, El Salvador, and Guatemala; and the now defunct Self-Exiled Persons Class Regulations, which included the East Bloc countries until the political thaw of last year.[41]

Perhaps not surprisingly, there is a reluctance on the part of the Canadian government to create new designated classes. If Hong Kong is made a designated class, what about the Kurds in Iran, Iraq, and Turkey, the Sikhs in India, or the Tamils in Sri Lanka? One could compile a very long list of those who might qualify to become a designated class. To decide who deserves to qualify as a designated class or not is a very difficult value judgment, at best. Of recent date, strong pressures to place Lebanon in a designated class were firmly rejected, although some administrative and procedural relief was afforded.

Nevertheless, Hong Kong will be in a unique situation in 1997, and there are very substantial ethnic Hong Kong and Chinese communities in Canada which possess a vote in Federal elections. Politicians are highly sensitive to the voting propensities of ethnic communities. If a well organized campaign were mounted to place Hong Kong in a designated class or otherwise to provide special measures as was done for PRC nationals following the Tiananmen tragedy, it could happen if events unfold which rally general public support in Canada behind the proposals.

Recent Statements by the Canadian Prime Minister

On his visit to Hong Kong in May of 1991, Prime Minister Mulroney made no promises of dramatic change in Canadian immigration policy toward Hong Kong.[42] Although he spoke of more Hong Kong immigration to Canada, this was said to be in the context of increases contemplated by the 1991-1995 Immigration Plan.[43] However, he was also reported as saying that if there were a sudden change in Hong Kong's political climate, Canada might allow much larger numbers of immigrants than currently anticipated.[44]

Exactly what might be regarded as "a sudden change in Hong Kong's political climate" is open to various interpretations, but it at least suggests that the present Canadian government recognizes that its current position is changeable. Of course, there is no assurance that the present Prime Minister will be on the scene until 1997, as he and his party will be facing a general election long before then. However, a change in the governing party would not necessarily mean a change of policy in this regard.

It should also be remembered that the *Immigration Act* requires the Minister of Employment and Immigration to report annually on immigration levels, which provides a yearly opportunity for new initiatives. Furthermore, a new five year plan is contemplated for the 1996-2000 period, which could give rise to a major shift in policy with respect to Hong Kong before mid-1997.

The "Brain Drain"

Canadian immigration policy is largely based on selection of the most highly qualified in terms of Canada's perceived needs, and this has been so since the turn of the century.[45] As a result, however, source countries often lose persons whose talents could well have been of considerable significance to the development and welfare of the homeland. Although Hong Kong is certainly not an underdeveloped area, the loss of skilled human resources obviously has a negative impact on its continuing vigour and viability.

To counter this difficulty, it has been proposed that instead of a maximum of two years being allowed from the time of issuance of an immigrant visa to the date of landing in Canada, the period be increased to between ten and fifteen years.[46] If accepted, this change would enable Hong Kong holders of Canadian immigrant visas to stay in Hong Kong for the present and even after 1997 to see how well or badly the new order affects their lives.

From the Canadian perspective, however, such an arrangement has distinct disadvantages. The planned and orderly flow of immigrants might be severely disrupted if events led to a sudden influx of accumulated Hong Kong visa holders, particularly in the area of settlement services. Circumstances of the visa holder could well change substantially between the issuance of the visa and the decision to leave for Canada. If deferred entry is permitted for persons from Hong Kong, it would be very difficult to deny a similar arrangement to immigrants from other source countries. Indeed, section 15 of the *Canadian Charter of Rights and Freedoms* might require equal treatment for immigrants from all source countries.

Two years would seem to be a reasonably generous period to permit someone to get business and family affairs in order and to leave, although obviously it is too short for many prospective Hong Kong emigrants who wish to retain their advantageous situation in Hong Kong until 1997 and perhaps beyond. Ten to fifteen years of grace is unlikely to be accepted by the Canadian government, which understandably would like to see the

attributes of immigrants contributing to the Canadian scene at the earliest possible time. Perhaps a shorter period of postponement ending on 30 June 1997 would be a suitable compromise.

For those who have already emigrated from Hong Kong to Canada but find that economic opportunities are more advantageous in Hong Kong and, therefore, wish to return while maintaining permanent resident status in Canada, section 24(2) of the *Immigration Act* provides that a person will be deemed to have abandoned Canada as a place of residence if he or she is outside Canada for more than 183 days in any twelve month period, unless a contrary intention can be established. Although it is possible to obtain a returning resident permit which, in the absence of evidence to the contrary, is proof of non-abandonment, Immigration Canada has been very reluctant of recent date to issue such authorizations to landed immigrants from Hong Kong. Thus, the Canadian statutory provisions on abandonment of permanent resident status work against returning to Hong Kong to continue one's career or employment until the 1997 situation clarifies itself.

Similar problems arise with respect to obtaining Canadian citizenship, for which a permanent resident must have resided in Canada for a total of three of the previous four years. Once Canadian citizenship has been acquired, however, the recipient may return to Hong Kong forever without risk of being denied reentry into Canada.

Finally, one might observe that the selective nature of Canadian immigration law favours the wealthy and the skilled among others, but does little for the great majority of Hong Kong inhabitants whose particular qualifications are either insufficient or not in demand for admission to Canada. Oddly enough, there have been recent calls from high places in Canada for selection standards to be raised even further, in order to admit only the most highly qualified of applicants.[47]

Convention Refugee Claims

It may come as a mild surprise that some Convention refugee claims have been made in Canada by persons alleging that they are from Hong Kong.[48] Since Canada's new Convention refugee determination procedures came into force on 1 January 1989, six Hong Kong claims have been received, five of which were rejected as having no credible basis at the initial hearing stage and one abandoned.[49] So there would seem to be no future at the present time for someone from Hong Kong to try to take this route for entry to Canada.

There remains the extremely complex and difficult problem of

Convention refugee claimants presently in Hong Kong, principally from Vietnam. It is a topic which has already been widely addressed elsewhere[50] and is beyond the scope of extensive consideration here. Nevertheless, it may be worth noting in passing that Canada has received very substantial numbers of Vietnamese through Hong Kong and elsewhere over more than fifteen years, and has given them special consideration as a designated class by regulation.[51] At the International Conference on Indochinese Refugees at Geneva in June 1989, Canada announced that it would resettle up to 16,000 persons from Southeast Asia over the following three years.[52]

If one surveys the 1991-1995 Immigration Plan, the number of Government assisted refugees is projected to remain at the 1990 level of 13,000 each year to 1995 without any increase. Furthermore, the annual levels of privately sponsored refugees are projected as declining from 24,000 in 1990 to 15,000 in 1994 and 1995. So the 1991-1995 plan envisages a decrease, rather than an increase, in Convention refugees from outside Canada.[53]

On his recent visit to Hong Kong, the Canadian Prime Minister was quoted in the Canadian press as having said, "Canada believes that the answer is that we all take more refugees, and this is what we're in the process of doing."[54] By using the words "we all," the Prime Minister clearly included his own country as being "in the process of" taking "more refugees." Canadian officials on the scene quickly asserted that the Prime Minister had made no specific offer to take additional refugees from Hong Kong, and that he had said only that he would look into the matter. Granted that there was no specific offer, but his statement about being "in the process of" taking more refugees does not square with only looking into the matter.

Whether or not the Prime Minister simply made a slip of the tongue in an unguarded moment, Canada clearly could increase its intake of Convention refugees presently situated in Hong Kong if it chose to do so, just as it did in 1989 as announced at the International Conference on Indochinese Refugees. This could be done in small numbers quietly with little public fanfare or in larger figures if the political winds favoured such a move. In view of the present economic recession in Canada and widespread concern over the high volume of inland Convention refugee claimants, however, the Canadian public mood would not seem to favour a major effort to bring more Convention refugees from Hong Kong at the present time. Nevertheless, the situation could well change between now and 1997.

And After 1997?

What may be the exact status of Hong Kong inhabitants with respect to nationality and emigration after 1997 remains somewhat unclear, to say the least, although much has been written on the topic.[55] If some sort of distinct status for those in Hong Kong, encompassing freedom of movement and a right to emigrate without limitation, is recognized in fact, then there would seem to be no reason why the present favourable relationship with Canada in immigration matters should not continue.

However, if sovereignty over nationality and emigration is asserted from Beijing, then a very different state of affairs obviously would exist. In 1988 the People's Republic of China ranked a distant thirteenth as a source of immigrants to Canada, with only 2,765 in number out of the total of 160,768, which is 1.7% of the total.[56] This is a far cry from the first place position of Hong Kong with 22,877 migrants to Canada, representing 14.2% of Canada's immigrants in that year. Nevertheless, emigration from the People's Republic to Canada has occurred in the past, exists to a limited extent at present, and undoubtedly will continue in the future, notwithstanding numerous obstacles to overcome. It would not seem unreasonable to think that those in Hong Kong after 1997 would share in opportunities for emigration to Canada from the People's Republic, although the pre-eminent position of Hong Kong inhabitants at the present time in this regard is unlikely to continue.

Should the political situation in Hong Kong deteriorate in 1997 and after, there is the rather chilling prospect that persons in Hong Kong may wish to claim refuge in a country which recognizes the United Nations Convention. As mentioned earlier, Canada has been relatively sympathetic to refugee claimants and accepts more Convention refugees per capita than any other nation.

In terms of Convention refugee claimants from the People's Republic of China between 1 January 1989 and 31 March 1991 for whom a final decision has been rendered under the new Canadian refugee determination procedure, 798 were accepted and 1,084 rejected.[57] These figures do not take into account, moreover, the thousands of PRC citizens who were granted permanent resident status in Canada under special policy measures introduced following the Tiananmen tragedy, which remained in place until mid-October 1990.

One fervently hopes, of course, that resort by the people of Hong Kong to the U.N. Convention on the Status of Refugees will not be necessary after mid-1997. Nevertheless, if worse comes to worse, it would seem

reasonable to predict that Canada would respond not only under the Convention but through the invocation of special measures of some kind. Looking to what may happen in 1997 and beyond, however, is mere speculation at this point in time.

Some Concluding Thoughts

It is quite apparent that Hong Kong inhabitants have fared very well indeed over the past decade under the prevailing policies for immigration to Canada. This favourable situation should continue throughout the period of the Canadian Immigration Plan for 1991-1995. Furthermore, there is no reason to think that Hong Kong's pre-eminent position in emigration to Canada will change after 1995; indeed, there is the real possibility that some sort of special programme may be implemented by Canada for Hong Kong as mid-1997 draws nearer.

Canada's criteria for immigration admirably suit many prospective emigrants from Hong Kong because of the emphasis on education, training, experience, skills, and other factors regarded as particularly beneficial to Canadian economic and social development. However, the down side of this policy from the Hong Kong perspective is surely that the great majority of its inhabitants have no prospect of meeting the demanding Canadian standards for admission.

With respect to Vietnamese refugee claimants in Hong Kong, it would seem that Canada is now inclined to coordinate its efforts with those on the international scene, although special measures, such as have been taken by Canada for Vietnamese in the past, are still a possibility as 1997 approaches. After 1997 Canada's humanitarian record toward refugees would undoubtedly be extended to those from Hong Kong if the situation so warranted.

Notes and References

1. Immigration Canada, *Immigration to Canada: A statistical overview* (Public Affairs and Policy Branch, 1989), p.13; Diana Lary, "Immigration Statistics," *Canada and Hong Kong Update*, Spring 1990, pp. 2, 5, using statistics supplied by Employment and Immigration Canada; Diana Lary, "Immigration to Canada, 1990," *Canada and Hong Kong Update*, Winter 1991, p. 6, employing statistics supplied by Employment and Immigration Canada; "An Immigrant Profile," *The Globe and Mail*, 5 June 1991, p. 16, the source being *Canadian Press*.

2. Lau Siu-kai and Wan Po-san, "1997 and Emigration in Hong Kong," *Canada and Hong Kong Update*, Spring 1990, p. 3.

3. For a highly individualized description, see Margaret Cannon, *The China Tide: The*

Revealing Story of the Hong Kong Exodus to Canada (Toronto: Harper & Collins, 1989). For a comprehensive view of the 1997 scenario, see Peter Wesley-Smith and Albert Chen, *The Basic Law and Hong Kong's Future* (Hong Kong: Butterworths, 1988).

4. "1986 Nansen Medal Awarded to the People of Canada," *Refugees* 36 (1986): 29.

5. For an interesting look at issues of nationality in Hong Kong after 1997, see J. Arthur McInnis (ed.), *Legal Forum on Nationality, Passports and 1997* (Hong Kong: The Canadian Chamber of Commerce in Hong Kong and the Faculty of Law of the University of Hong Kong, n.d.).

6. See Canada Manpower and Immigration, *Report of the Canadian Immigration and Population Study: The Immigration Program* (Ottawa: Canada Manpower and Immigration, 1974), v. 2, chap. 1, on "The Evolution of Policy."

7. For a description of events leading up to the 1976 Act, see Freda Hawkins, *Canada and Immigration: Public Policy and Public Concern*, 2nd ed. (Kingston and Montreal: McGill-Queen's University Press, 1988), pp. 373-77.

8. *Immigration Act, 1976*, S.C. 1976-77, c. 52, s. 7; now R.S.C. 1985, c. 1-2, s. 7.

9. Employment and Immigration Canada, *Annual Report to Parliament: Immigration Plan for 1991-1995* (Ottawa: Public Affairs and Immigration Policy Group, 1990).

10. Ibid, p. 9.

11. For a contrary view, see Economic Council of Canada, *New Faces in the Crowd: Economic and Social Impacts of Immigration* (Ottawa: Minister of Supply and Services, 1991), pp. 33-36.

12. *Immigration Regulations, 1978*, and amendments thereto, Schedule I.

13. Ibid., s. 2 (1), 8 (1) (a), Schedule I - Factor 5. This change was announced by the Minister on 15 May 1991.

14. *Immigration Regulations*, s. 11(2). A similar prohibition in section 11(1) of the *Immigration Regulations* applies to anyone who does not acquire at least one point for "experience," but this can likewise be overcome by arranged employment or a designated occupation.

15. Immigration Canada, *Immigration to Canada*, p. 41, for the statistics in this paragraph.

16. For example, the 3,954 business immigrants from all source countries in 1988 comprised only 2.46% of the 160,768 immigrants who came to Canada in that year. Of these, the 1,106 from Hong Kong represented substantially less than 1% of the total. See ibid., for these statistics.

17. Ibid, p. 45. Whether the estimate is reliable or whether all of the windfall eventually materializes is, of course, problematic.

18. See the recently released publications: Economic Council of Canada, *New Faces in the Crowd*; and N. Swan et al., *Economic and Social Impacts of Immigration: A research report prepared for the Economic Council of Canada* (Ottawa: Minister of Supply and Services, 1991).

19. See *Hui v. Minister of Employment and Immigration* (1986) 2 F.C. 96 (Federal Court of Appeal).

20. See Victor Malarek, "Visas for Sale to High Rollers," *The Globe and Mail*, 15 October 1987, p. 7; Victor Malarek, *Haven's Gate: Canada's Immigration Fiasco* (Toronto: Macmillan, 1987), chap. 13, p. 215.

21. Some business immigrant recipients of conditional landings are now required to report every six months to establish that they are complying with the conditions of admission. See Estanislao Oziewicz, "Lawyer Contends New Rule Limits Business Immigrants," *The Globe and Mail*, 18 October 1991, p. 6.

22. See Paul Watson, "Didn't Create Jobs, Immigrant Told to Leave," *The Toronto Star*, 10 November 1990, p.1. This removal order was overturned on appeal.

23. *Immigration Regulations*, SOR/89-585, SOR/90-564.

24. David Roberts, "Manitoba Director Denies Joining Board for Profit," *The Globe and Mail*, 26 March 1991, p. 4; David Roberts, "Filmon Accused of Tory Patronage," *The Globe and Mail*, 3 April 1991), p. 1, 4; David Roberts, "Filmon Repeats Patronage Denial, *The Globe and Mail*, 4 April 1991, p. 4 .

25. H.M. Goslett, "Investor Program - Minimum Investment Levels Increase" (1990), 2 Imm. & Cit., No. 7, pp. 1-2.

26. Ibid.

27. Hugh Gillespie, "Immigrant Investor Projects - Marketing in Hong Kong" (1990), 2 Imm. & Cit., No. 6, pp. 1-2.

28. Many lawyers in the Province of Ontario recommend to prospective immigrant clients that, if possible, the entrepreneur route be used in preference to the investor category because of the problems associated with the latter, discussed above.

29. Employment and Immigration Canada, *Immigration Manual*, IS 5.07 (3).

30. See "Self-Employed Business Applicants" (1989), 1 Imm. & Cit., No. 6, pp. 1-2; *Yang v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R.(2d) 48 (Federal Court Trial Division), and *Ho v. Canada (Minister of Employment and Immigration* (1989), 8 Imm.L.R.(2d) 38 (Federal Court Trial Division), upheld on appeal: (1990), 11 Imm.L.R.(2d) 12 (Federal Court of Appeal).

31. *Immigration Regulations*, s. 4 (1).

32. This change was part of the policy developed for the 1991-1995 Immigration Plan. Prepublication of the proposed new regulations on dependents was released on 2 November 1991 in the *Canada Gazette, Part I*, p. 3578.

33. *Immigration Regulations*, s. 3(a), and *Immigration Act*, s. 77, respectively.

34. *Immigration Regulations*, s. 2(1), 10, 11. Sons and daughters or brothers and sisters of the sponsor receive a bonus of 15 units; all other assisted relatives receive an extra 10 units.

35. *Immigration Regulations*, s. 11(1),(2).

36. *Immigration Manual*, IS 1.18, 1.35. Note that this rather special situation is governed by discretionary policy directions in the *Immigration Manual*, and is not to be found in the *Immigration Act* or the *Immigration Regulations*.

37. Employment and Immigration Canada, *Annual Report, Immigration Plan for 1991-1995*, p. 12, described under the heading "Managing the Immigration Process."

38. Ibid.

39. Estanislao Oziewicz, "Ottawa Speeds Up Visa Process," *The Globe and Mail*, 29 May 1991, p. 4.

40. Ross Howard, "Canada Not Changing Hong Kong Policy," *The Globe and Mail*, 2 March 1990, p. 11, citing and quoting a spokesman from the Canadian Department of External Affairs.

41. They are set forth in consolidated form in the *Immigration Manual*, IL 7.

42. Edith Terry, "Hong Kong Must Retain Distinctiveness, PM says," *The Globe and Mail*, 23 May 1991, p. 11; Edith Terry, "PM's Message Fails to Impress," *The Globe and Mail*, 27 May 1991), p. 11.

43. Edith Terry, "Hong Kong Autonomy Essential for Entire Region, Mulroney Says," *The Globe and Mail*, 25 May 1991, p. 10.

44. Terry, "PM's Message Fails to Impress," p. 11.

45. For a historical sketch of this and other periods in Canadian immigration, see Canada Manpower and Immigration, *A Report of the Canadian Immigration and Population Study: The Immigration Programme* (Ottawa, Canada Manpower and Immigration, 1974), v. 2.

46. "Visa Plan Aimed at Brain Drain," *The Toronto Sun*, 2 September 1990, p. 29, is an example in which the Canadian Chamber of Commerce in Hong Kong proposed a scheme to enable local staff of Canadian firms to obtain immigrant visas.

47. Estanislao Oziewicz, "MP Urges Closing Canada's 'Open Door'," *The Globe and Mail*, 14 June 1991, p. 6.

48. It is widely suspected that at least some of these are or were from the People's Republic of China and have passed through Hong Kong at some point.

49. Immigration and Refugee Board, "News Release," 19 January 1990, 1 February 1991, and 30 April 1991.

50. See, among much writing on the topic, Roda Mushkat, "Refuge in Hong Kong" (1989), 1 *Int. J. Ref. L.* 449; Le Xuan Khoa, "Forced Repatriation of Asylum-Seekers: The Case of Hong Kong" (1990), *Int. J. Ref. L.*, Special Issue 137; I.R. Hanson, "Hong Kong's Screen Door Policy: An Analysis of Hong Kong's Screening Procedures in the Context of

International Law" (1990), 16 *Brooklyn J. Int'l L.* 583; Teresa E. Dawson, "Hong Kong: Forced Return of Vietnamese Boat People is Legally Justified" (1991), 5 *Georgetown Imm. L.J.* 35.

51. From 1975 through to 1989, 91,000 Vietnamese were resettled in Canada, 5,700 of these in 1989. "Regulatory Impact Analysis Statement," SOR/90-626 (31 August 1990), 124 *Canada Gazette, Part II*, no. 119, p. 4114. The *Indochinese Designated Class Regulations* SOR/78-931 and amendments thereto have now been replaced for Vietnamese by the *Indochinese Designated Class (Transitional) Regulations*, SOR/90-627.

52. "Regulatory Impact Analysis Statement," SOR/90-626, p. 4112. The *Indochinese Designated Class (Transitional) Regulations* were passed in response to this undertaking.

53. It should be noted, however, that a substantial increase in refugees landed from within Canada is forecast by *The 1991-1995 Immigration Plan*, from 5,000 in 1990 to 10,000 in 1991, jumping to 25,000 in 1992 and each year thereafter, to and including 1995. Employment and Immigration Canada, *Annual Report, Immigration Plan for 1991-1995*, p. 9.

54. "World Morally Obliged to Aid Refugees, PM Says", *The Globe and Mail*, 24 May 1991, p. 11.

55. The articles and books on various aspects of nationality are too numerous to list here, but a wide selection is readily available for anyone interested in pursuing the issues.

56. Employment and Immigration Canada, *Immigration to Canada: A statistical overview* (Ottawa: Public Affairs and Immigration Policy Branch, 1989), p. 13.

57. Immigration and Refugee Board, "News Release," 19 January 1990, 1 February 1991, and 30 April 1991.

Individual and Corporate Status in Hong Kong

Philip Smart

Introduction

We have entered a decade which will see the most fundamental challenges the legal system of Hong Kong has ever encountered. The development of Hong Kong law is naturally a matter of great import to the people of the territory; yet, additionally, the international community as a whole is not unconcerned. However, this paper does not address the constitutional changes Hong Kong will undergo, nor does it deal with Hong Kong's position in public international law (that is, as a player on the world stage). Instead, the objective is to focus upon certain questions relating to status under Hong Kong law. Such questions affect anybody who (1) lives in Hong Kong; or (2) carries on business in Hong Kong; or (3) in some instances, merely trades with Hong Kong and/or the People's Republic of China.

This paper seeks to highlight certain of the more controversial, as well as practical, issues of both personal (individual) and corporate status. When referring to status we mean, broadly speaking, legal capacity and, more particularly, that range of personal as well as proprietary relationships governed by the personal law.

Individuals

In civil law systems, such as those on the continent of Europe or in Latin America, the personal law is determined by nationality. Hence, a French court would likely regard the law of Germany as the personal law of a German national. However, under Hong Kong law the personal law is governed by the domicile. (This is indeed the case in nearly all common law jurisdictions, e.g., England and Ireland, as well as most jurisdictions in the Commonwealth and the United States.) Thus, whenever the courts in Hong Kong are called upon to determine an individual's personal law, it is the place of domicile which must be ascertained. Whether that individual is a Hong Kong belonger, a British citizen, or is a U.S., French, German, Swiss, Australian, or Canadian passport holder (or all of the above) is not decisive. Domicile is, under Hong Kong law, the legal test connecting an individual to his/her personal law.

Ascertaining the place of domicile has always been problematic.[1] Yet

the position in Hong Kong is particularly unsatisfactory as, until now, it has always been the case that married women cannot have an independent domicile but automatically, and as a rule of law, take the domicile of their husbands upon marriage.

The common law rules on domicile will also be compared and contrasted with the test of "permanent residence" used in the Basic Law.

Corporations

Corporations are likewise regarded as having a domiciliary law—namely, the law of the place of incorporation.[2] Thus, the personal law of a company incorporated in British Columbia will be the law of British Columbia. Nevertheless, a most interesting question, particularly for those giving legal advice to businessmen and women, is the extent to which the law of Hong Kong interferes with, or rather exercises controls over, foreign corporations which carry on business or have assets in Hong Kong.

For example, it may be of some interest to those engaged in China trade to note that if a PRC trading company has any assets in Hong Kong (e.g., an account in credit with a bank in Hong Kong), then such a company may be wound up in Hong Kong under the Companies Ordinance.[3] This is so even if the PRC trading company in question has no branch or any other office in Hong Kong.

Personal Status

Domicile

(i) Outline

As determinative of the personal law, domicile must be considered over a broad range of status-related issues: e.g. capacity to marry, the mutual rights and duties of husband and wife, divorce, nullity, the legal relationship between parent and child, guardian and ward, legitimacy, and adoption, as well as intestate succession to movable property.

Ascertaining an individual's domicile has always been a matter of some complexity; for domicile is a legal notion, an idea of law, which unlike a passport has no physical, tangible existence. Yet there are, very roughly, three basic rules.[4] First, every person is (notionally) given a domicile at birth (the "domicile of origin"). Secondly, such domicile (that is, the domicile of origin) persists until replaced by a new domicile. Thirdly, a new domicile (the so-called "domicile of choice") is only acquired by an individual, of full age and capacity, through a combination of residence in a country with the intention of residing in that country permanently

or indefinitely. Hence, if a person with a domicile of origin in Ontario has come to live and work in Hong Kong, perhaps even for many years, that person will only acquire a new domicile (of choice) in Hong Kong if an intention to reside indefinitely in Hong Kong is established on the facts.[5] In this regard Hong Kong law is no different from other common law systems.

(ii) Married Women

Hong Kong law now finds itself in a most unusual, albeit not unique, situation when it comes to the domicile of married women. The common law of England maintained a fiction that husband and wife were one legal person. Thus, when ascertaining the domicile of a married woman, the courts considered that husband and wife would have but one domicile; namely, the domicile of the husband.[6] In other words, a married woman was incapable of having an independent domicile of her own; on marriage the wife automatically and without exception took the domicile of her husband.[7] Moreover, such dependency would only terminate upon death or divorce, not the mere separation of the parties.

This discrimination against married women, once referred to by Lord Denning MR as "the last barbarous relic of a wife's servitude,"[8] was abolished in England in the 1970s.[9] Similar reforms have taken place in other Commonwealth jurisdictions.[10] However, until now the common law has remained intact in Hong Kong. To give an example, let us say that a husband and wife have moved to Hong Kong from Canada. It may well be that a court in Canada might regard the husband as domiciled in Ontario but the wife as domiciled in New York State. However, a Hong Kong court has been obliged to treat the wife's domicile as dependent upon the husband. Husband and wife will have the same domicile, i.e. the husband's domicile.

The dependency of married women may, however, be drawing to a close. The Hong Kong Bill of Rights in Article 1 provides that rights are to be enjoyed without "distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The domicile of dependency of married women discriminates not perhaps on the basis of sex, but rather as a matter of status, i.e.marital status. Article 19(4) states that, "Spouses shall have equal rights and responsibilities as to marriage, during marriage and at its dissolution." In addition, Article 22 provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall

> prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Whilst the Bill of Rights does not appear to have been framed with discriminatory rules of the common law in mind,[11] there seems little doubt that the domicile of dependency of married women falls foul of Articles 19(4) and 22. It is also of some interest to note that the dependency of married women was questioned in Ireland as being unconstitutional.[12]

Yet, although the abolition of the dependency of married women is scarcely premature, the Bill of Rights leaves unanswered a great many questions. In particular, what is the domicile of a married woman upon the termination of her dependency:

> (1) does her previous domicile of dependency continue as a domicile of "quasi-choice";
> (2) does the domicile of origin at once revive; or
> (3) does the wife's domicile immediately prior to the marriage revive?

Option (1) seems, perhaps the most sensible.[13] Nevertheless, there is an obvious need for clear legislative guidance on this matter, particularly as a number of Ordinances were framed on the understanding that a married couple had, as a rule of law, the same domicile.[14]

The Basic Law

The Basic Law very sensibly steers well clear of domicile. Chapter III speaks of Fundamental Rights and Duties of Residents. Residents include "permanent residents" and "non-permanent residents." It will be of interest to the international business community to note that "permanent residents" encompass in Article 24:

> (4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence....

The concept of ordinary residence is largely free from legal technicalities.[15] A person ordinarily resides in Hong Kong if that person lives there as part of the normal order of his/her life. It is certainly not necessary that one intends to stay indefinitely.[16]

However, the Basic Law might have been a little clearer when it comes to the rights of corporations. Of course, not all the rights in Chapter III of the Basic Law can apply to corporate entities: the right to vote, freedom of movement, freedom of conscience, rights to social welfare, freedom of marriage, etc. We all know businessmen like to conduct their business affairs using the limited liability company, and there is no reason why corporations cannot be protected against unlawful search of premises (Article 29), privacy of communications (Article 30), the right to confidential legal advice (Article 35), and timely protection of their lawful rights and interests (Article 35).

The fundamental rights laid down in Chapter III apply to "residents" which "shall include permanent residents and non-permanent residents." A corporation cannot be a permanent or non-permanent resident. (A non-permanent resident must, *inter alia*, be qualified to obtain a Hong Kong identity card.) However, Article 24 does not exclude every resident other than permanent residents and non-permanent residents as therein defined. A good argument can be made that a company incorporated in Hong Kong and/or having its central management and control in Hong Kong is resident in Hong Kong.[17] It is a little surprising, given the crucial importance corporations play in the territory's economic life, that the Basic Law is not a little more forthcoming in this regard.

Corporations and Status

General

It was well over two centuries before the judges in England first recognized the right of foreign corporations to sue in the English courts.[18] The basic approach in this matter could scarcely be more simple: if a corporation is properly created in accordance with the law of the state of incorporation, it will be entitled to recognition under the common law rules. The status of such corporation, not surprisingly, is governed by the law of the state of incorporation.[19] Entities may be brought into existence abroad which simply could not be created under the law of Hong Kong. Here, one may refer briefly to cases in England and Ontario recognizing the rights of the liquidators of an "indivision," a type of mutual fund created under the law of Luxemburg but having no equivalent in England or Ontario.[20]

Similarly, if an Ontario corporation has shareholders in Hong Kong, the liability of those shareholders for the debts of the corporation will be governed by the law of Ontario. Likewise, Ontario law would regulate questions relating to corporate capacity, the interpretation of the

company's constitution, raising and maintenance of capital, exercise of directors' powers, as well as dissolution and amalgamation.[21] Yet, despite the importance attached to the law of the state of incorporation, a foreign corporation which carries on business activities in Hong Kong is subject to certain provisions of Hong Kong law.

Every foreign corporation which has a "place of business" in Hong Kong must comply with Part XI of the Companies Ordinance (Cap.32).[22] A "place of business" is interpreted very broadly; so that it is not necessary to show actual trading in Hong Kong, even a "representative office" may be enough to come within Part XI.[23] Part XI requires foreign corporations to register in Hong Kong and provide information and accounts to the Registrar of Companies. Additionally, foreign corporations with a place of business in Hong Kong must register any charges on property in Hong Kong.[24]

Winding Up

A Hong Kong company may, of course, be wound up in Hong Kong. What should not be overlooked, however, is that a foreign corporation may also be subject to the winding up jurisdiction of the Hong Kong courts.[25] Foreign corporations have been held to be within the expression "unregistered company" under s.326 of the Companies Ordinance. As such, they can be wound up if the foreign corporation (a) has ceased to carry on business; or (b) is unable to pay its debts; or (c) it is considered just and equitable that the corporation be wound up.[26] An unregistered company, which as has been seen includes a foreign corporation, is deemed to be unable to pay its debts if, *inter alia*, a creditor owed a sum exceeding HK$5,000 has demanded payment thereof, but the company has for three weeks after service of the demand neglected to pay such sum.[27]

The winding up jurisdiction in respect to unregistered companies is remarkably broad and, on its face, would seem to include every foreign corporation regardless of any connection to Hong Kong. Thus, at one time the courts held that only a foreign corporation with a branch office came within the relevant provisions. More recently, it has been established that any corporation which has assets in Hong Kong may be wound up, regardless of whether it has an office or has carried on business in Hong Kong.[28]

The presence of assets test can be a most useful weapon in litigation. Let us say that a Canadian business has been dealing with a PRC trading enterprise and is owed money by the PRC entity. If the PRC enterprise has any assets in Hong Kong, e.g., an account in credit at a bank, then that

enterprise will be subject to the winding up jurisdiction of the Hong Kong courts. This is so even though the parties may have little or no other connection to Hong Kong. So far there are no reported examples of the Hong Kong court making a winding up order in respect to a PRC corporation. Nevertheless, the option is available, and the threat of such an order can undoubtedly be a useful pressure tactic to try to force payment.

Conclusion

Having identified and discussed some of the current issues affecting status, it is perhaps necessary to step back for a brief moment and consider the broader context of the development of law in Hong Kong. Private international law governs the whole field of civil and commercial relations between parties in different jurisdictions. Currently, Hong Kong private international law is very much an "international" system. With a few exceptions, (largely in respect to reciprocal enforcements of judgments within the Commonwealth[29]) Hong Kong law has but one set of private international law rules. Those same rules apply in all cases, regardless of whether the parties are from Singapore, Canada, Australia, Mexico, or China. Yet, when Hong Kong becomes a Special Administrative Region of the PRC, it will be somewhat incongruous to continue to treat the PRC as a wholly foreign country. Just as Canada, Australia, or the USA have particular inter-state conflicts rules, or as the UK has adopted special provisions when dealing with EC parties, so too Hong Kong law must soon consider radical amendment to its conflicts rules to take account of its own change in status.

Notes and References

1. See generally, Albert Dicey and J.H.C. Morris, *The Conflict of Laws*, 11th ed. (London: Stevens, 1987), chap. 7.

2. Ibid., p.1130.

3. Discussed further below.

4. Dicey and Morris, *Conflict of Laws*, pp.125-149.

5. See, for example, *Coyne v. Coyne* [1960] HKLR 163.

6. Dicey and Morris, *Conflict of Laws*, p.151.

7. *Lord Advocate v. Jaffrey* [1921] AC 146.

8. *Gray v. Formosa* [1963] P 259 at 267.

9. Domicile and Matrimonial Proceedings Act 1973, in Dicey and Morris, *Conflict of Laws*, pp.151-52.

10. See, for example, Domicile Act 1976 (NZ) and Domicile Act 1982 (Aus.).

11. See section 3(1) and (2).

12. Note, *passim*, *K.D. v. M.C.* [1985] IR 697, *Gaffney v. Gaffney* [1975] IR 133.

13. See, *passim*, *IRC v. Duchess of Portland* [1982] Ch 314.

14. See, for example, Matrimonial Causes Ordinance, Cap. 179 LHK, s. 59.

15. For a full analysis see Philip Smart, "Ordinarily Resident: Temporary Presence and Prolonged Absence" (1989) 38 ICLQ 175.

16. *Shah v. Barnet London Borough Council* [1983] 2 AC 309 at 343.

17. See *passim*, *Swedish Central Railway v. Thompson* [1925] AC 495, *Unit Construction Co. Ltd. v. Bullock* [1960] AC 351.

18. *Henriques v. Dutch West India Co.* (1728) 2 Ld Raym 1532, 1535.

19. Dicey and Morris, *Conflict of Laws*, p.1128.

20. *Baden, Delvaux and Lecuit v. Societe Generale* [1983] BCLC 325 and *Re ITT* (1975) 58 DLR (3d) 55.

21. See, for example, *Sudlow v. Dutch Rhenish Railway Co.* (1855) 21 Beav 43, *Bill v. Sierra Nevada Lake Water and Mining Co.* (1860) 1 LT 256, *Pickering v. Stephenson* (1872) LR 14 Eq 322, *Pergamon Press Ltd. v. Maxwell* [1970] 1 WLR 1167, *National Bank of Greece and Athens SA v. Metliss* [1958] AC 509.

22. Companies Ordinance (1984) Cap. 32 LHK, s.332.

23. *South India Shipping Corp. v. Export-Import Bank of Korea* [1985] 1 WLR 585. See, however, the definition in Companies Ordinance (Cap. 32) s.341.

24. Companies Ordinance (Cap.32) s.91.

25. See generally, Philip Smart, *Cross-Border Insolvency* (London: Butterworths, 1991), pp.57-70.

26. Companies Ordinance (Cap.32) s.327.

27. Ibid.

28. *Banque des Marchands de Moscou (Koupetschesky) v. Kindersley* [1951] Ch 112, *Re Compania Merabello San Nicholas* [1973] Ch 75, and *Re Irish Shipping Ltd*, [1985] HKLR 437. See also *Re A Company (No. 00359 of (1987)* [1988] Ch 210, and Smart, *Cross-Border Insolvency*, pp. 63-65.

29. See, for example, the Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap. 319 LHK, and the Maintenance Orders (Reciprocal Enforcement) Ordinance, Cap. 188 LHK.

International Civil Proceedings with Particular Regard to Canada and Hong Kong

M.D. Copithorne

Introduction

As the tempo of business and social interaction across national boundaries increases throughout the world, so too does involvement in legal proceedings touching more than one jurisdiction. The diversity and in some cases inconsistencies of legal process in various countries, reinforced on occasion by a degree of legal xenophobia, have traditionally limited the interaction between legal jurisdictions, particularly between the two predominant systems of civil and common law. The bridging process that has grown up is perhaps most frequently described as international civil procedure, an elastic term that encompasses a variety of international legal process.

The mechanisms used in this process fall into three general categories: local rules (both common law and statute based), bilateral civil procedure conventions (largely a pre-World War II phenomenon), and multilateral civil procedure treaties (largely a post-World War II phenomenon). These legal tools are sometimes viewed as a progression; and yet, in another sense they are three systems which operate largely independently, usually without claiming exclusivity. A quite typical provision in the multilateral conventions states that they do not derogate from other arrangements in existence between the parties or those which may come into existence.

The major source of multilateral treaties on the subject of international civil procedure is The Hague Conference on Private International Law. The Conference is dedicated to the progressive unification of private international law and has produced numerous multilateral civil procedure treaties. For a status chart of Canadian and Hong Kong participation in The Hague Civil Procedure Conventions as of May 1991, see Appendix A. In addition, there are certain regional treaties of significance, particularly those associated with the EEC.

International civil procedure is an area of growing international cooperation. Its parameters are imprecise and can, for example, be construed to include subjects such as child abduction. Many excellent books and handbooks exist on the subject of international civil procedure, and in many cases they deal with the various topics most comprehensively.[2] This

paper makes no claim to such completeness. Rather, its focus will be on the three topics traditionally viewed as the core of international civil procedure: the service of documents abroad, the taking of evidence abroad, and the recognition and enforcement of foreign judgments.

More particularly, this paper seeks to examine these and several related topics within the context of Canadian and, to a lesser extent, Hong Kong rules and practice. Its objective is to ascertain the implications, if any, of the transfer of Hong Kong sovereignty to China in 1997, for existing civil procedure arrangements as they may apply between Canada and Hong Kong.

Most of Canada shares with Hong Kong a common law tradition, and thus, many of the concepts and specific rules applicable in the two jurisdictions in international civil procedure matters are similar. On the Canadian side, an important exception is Québec with its civil law tradition and distinctive local rules. Québec has entered into one bilateral entente concerning civil procedure, that with France. This paper looks primarily at the common law based linkages between Canada and Hong Kong. It would have been more complete if time and space had permitted similar treatment being accorded to Québec's relationships with Hong Kong.

The Service of Documents Abroad

Jurisdiction

In the common law provinces and territories of Canada, personal service is the foundation of jurisdiction in actions *in personam.* The jurisdiction of the court of a province or territory may be invoked as long as the defendant has been personally served with a writ of summons or originating process within the province where it was issued. For the purpose of service, any territory other than that over which the court has jurisdiction—including other Canadian provinces—is "foreign."

Even temporary presence of the defendant within the jurisdiction has been sufficient, upon personal service, to establish the jurisdiction of the courts.[3] However, where there is no relation between the province concerned and the matter being litigated, it is open to the foreign defendant to seek a stay of proceedings if he/she will suffer some injustice because the proceedings are oppressive, vexatious, or an abuse of process, and a stay of proceedings would not work an injustice upon the plaintiff.

Service of Judicial Documents Ex Juris: Canadian Rules

Service *ex juris*, the extension of the court's jurisdiction over absent

defendants, was not available at common law but was introduced by the 1852 Common Law Procedure Act in England.[4] In Canada, provincial statutory rules provide for service of a writ of summons or other originating process *ex juris*. In some provinces (e.g., Alberta) leave is required to serve the writ *ex juris*. The applicant has to satisfy the court that the subject matter of the action is one which *prima facie* falls within the enumerated categories in the rules. Often the applicant has to go further and demonstrate on the balance of probabilities, that there exists a good cause of action within the enumerated categories in the rules.

In other provinces (e.g., British Columbia) in the majority of cases, no prior leave of the court needs to be sought before serving a writ *ex juris*. Service of the writ may be made as of right, as long as the subject matter of the action falls within one of the enumerated categories in the rules. In such cases the defendant may apply to a British Columbia court for an order setting aside the service on the grounds that the subject matter of the action is not one which clearly falls within the enumerated categories set out in the rules.

The Hague Service Abroad Convention

The Hague Convention of 15 November 1965 on the Service of Judicial and Extrajudicial Documents in Civil and Commercial Matters (The Hague Service Convention) came into force for Canada on 1 May 1989.[5] The Convention was extended to Hong Kong by the United Kingdom, coming into force 19 July 1970. The Convention, a product of The Hague Conference on Private International Law, creates a regime for the service of judicial or extrajudicial documents in civil or commercial matters in states party to the Convention. The phrase "civil or commercial" is not defined in the Convention, but generally the practice in common law jurisdictions has been that anything that is not criminal is civil or commercial. A recent decision of the House of Lords in *re Norway's Application* (Nos. 1 & 2)[6] shows this to be the case, where Lord Goff remarked at page 806:

> I have no doubt, under English law...proceedings in any civil matter should include all proceedings other than criminal proceedings, and proceedings in any commercial matter should be treated as falling within proceedings in civil matters.

Civil law jurisdictions, however, exclude administrative matters from the category of civil or commercial. "Judicial" documents are those issued in the course of civil or commercial litigation which under the law

of the forum state must be served on the opposite party or other persons concerned. This would not include documents issued by an administrative tribunal or agency. "Extrajudicial" documents are those not directly connected with a lawsuit but the issuance of which, nevertheless, requires the intervention of an "authority or judicial officer."

According to the preamble of The Hague Service Convention, the purpose is:

> (a) to establish a system that brings actual notice of the document to be served to the recipient in sufficient time to enable him/her to defend him/herself;
> (b) to simplify the method of service of judicial documents issued by the courts of the state of origin in the state of execution; and
> (c) to facilitate proof that service has been effected abroad.[7]

The Convention attempts to bring uniformity to the service of documents in civil and commercial matters. Even within common law jurisdictions, local laws regarding service vary. The Convention does not purport to affect existing laws of service in contracting states, and it does not derogate from any other international agreements that contracting states may have entered into regarding matters governed by the Convention.[8]

The Convention provides for the establishment of "central authorities" by contracting states to act as receiving agents for requests for service from other contracting states. It makes mandatory the use of model forms for the transmission of requests and for the return of executed requests.

The central authority has either to serve the documents itself or arrange to have them served by an appropriate agency. In federal states, such as Canada, there can be several central authorities. The Department of External Affairs in Ottawa and the provincial Departments of Justice are designated as central authorities. In Hong Kong, the central authority is the Chief Secretary.

Service of Foreign Judicial Documents in Canada: Treaty States and Non Treaty States

In addition to The Hague Service Convention procedure, there are two other potential routes—that of requests for service originating in states with which Canada has a bilateral treaty regarding legal proceedings in civil and commercial matters, and that of requests for service originating in states with which Canada has no treaty relationship. Between 1928 and

1939 Canada entered nineteen bilateral treaties regarding proceedings in civil and commercial matters.[9] All of these treaties are with civil law countries, eighteen in Europe and one in the Middle East. These treaties cover both service abroad and the taking of evidence abroad. The procedures in the treaties are not always mandatory. Generally, they specify the minimum information required. In the case of service, the documents are transmitted to the Deputy Attorney General in the appropriate province, either by the foreign diplomatic mission in Canada or by the Department of External Affairs, should it have received the initial request for service. They are then served according to local rules of procedure.

Where The Hague Service Convention is not applicable and where there is no bilateral treaty relationship, service is accomplished by way of a letter of request from a party forwarded direct to the sheriff, bailiff, or other process server where the service is to be effected.

Hong Kong Practice

Common law concepts of personal service operate in both Hong Kong and much of Canada. Under Order 11 of the Rules of the Supreme Court of Hong Kong, service *ex juris* is generally limited to countries with which there is a bilateral civil procedure convention, to signatories of The Hague Service Convention, to cases in which service will be effected by the receiving government, and to cases in which service can be effected by a British consular official without offense to the laws of the receiving country.[10]

Canada and Hong Kong

As between Canada and Hong Kong, the service *ex juris* can be achieved under the local rules in each place, and since 1989 it can also be achieved under The Hague Service Convention. It is not known to what extent litigants are now taking advantage of the latter procedure; but assuming it grows in popularity, the question then is whether Hong Kong's participation in The Hague Service Convention will survive 1997. This will be discussed below.

The Taking of Evidence Abroad

Judicial Assistance; International Comity

One way that courts are afforded judicial assistance is by the provision of foreign evidence (either testimony or the production of documents) for use in their proceedings. Letters of request (or letters rogatory) are the expression by the courts of their request for this assistance. The principle

underlying the request, as well as its enforcement, is international comity, a concept often defined as the deference shown by a state's courts to the courts and laws of another state. Canadian courts have decided that in the interests of comity, foreign requests for judicial assistance are to be given full force and effect wherever possible.[11] While reciprocity is a key element, the Ontario Court of Appeal has said that "...the comity of nations upon which international legal assistance rests does not require precise reciprocity."[12]

The Taking of Evidence in Canada

As has been mentioned, Canada is a party to a number of bilateral conventions governing civil procedure. Generally under these treaties, letters of request should be drawn up in the language of the authority to whom the request is addressed or be accompanied by a certified translation. Letters of request are to state the nature of the proceedings for which the evidence is required and the full names of descriptions of the witnesses. Letters of request should also be accompanied by a list of interrogatories and a certified translation of those interrogatories, or a request that the competent authorities allow the questions to be asked *viva voce* if desired. Evidence may be taken in accordance with the procedure recognized by the law of the state of origin. Any compulsory powers which are to be used by the executing authority will be governed by local laws of procedure. The treaties also provide a right to counsel for those examined.

Where no convention exists between Canada and the requesting state, an application for an order to have evidence taken in Canada may be made either under the *Canada Evidence Act*[13] (criminal and civil matters) or under the appropriate provincial *Evidence Act*[14] (civil matters). Usually, a local lawyer will make an application for an order to obtain the testimony of a witness within the jurisdiction of the court, and have himself appointed commissioner for that purpose. The production of all kinds of documents may be ordered, and the appointed commissioner will have all the necessary powers to compel the attendance of the witness and production of the documents.

Generally, the foreign applicant first establishes that under the rules of its own jurisdiction, the requesting court has the power to direct the taking of evidence in a foreign jurisdiction, and also that it is unable to obtain the evidence in question without the assistance of the requested court.[15] In the absence of evidence to the contrary, the foreign order will

be presumed to be regular and in accordance with the rules in the requesting jurisdiction.[16]

The following have been enunciated by Canadian courts as the essential elements of any request for the taking of evidence:[17]

(a) that the letter of request constitutes a formal request from a court in a foreign jurisdiction to a Canadian court;
(b) that the discovery sought is not against an individual who is not party to the litigation, in violation of local rules of procedure;[18]
(c) that the foreign court is a court of competent jurisdiction before which the matter is pending (not an administrative tribunal);[19]
(d) that the foreign court is desirous of obtaining testimony from witnesses within the local jurisdiction; and
(e) that the evidence to be taken will be used in the foreign trial and not for discovery or in order to determine whether it is sufficient to support the initiation of a foreign action.[20]

The court may go behind the recitals in a letter of request and engage in an inquiry which may include a review of the foreign proceedings.[21] The following are questions the court may consider:[22]

(a) has the evidence sought been identified?;
(b) is the evidence relevant to a substantial issue in dispute between the litigants?;
(c) is it necessary to obtain the evidence in the manner proposed?;
(d) is there a reasonable likelihood that the evidence will be obtained in the manner proposed?;
(e) does the applicant have a *bona fide* intention to use the evidence at trial if it is obtained?; and
(f) that the granting of an order will not place the person to be examined in the position of having to commit an offence to comply with the order.[23]

The requested court cannot decide the relevancy or admissibility of the evidence to be adduced; that is a function which belongs to the foreign trial court.[24] Letters of request will not be enforced if to do so would be contrary to the public policy or at the expense of justice to the citizens of the requested state.[25] Further, no witness is required to undergo a broader form of inquiry than would be the case if the litigation were being conducted locally.[26] It should be noted that unlike some states, in Canada there are no prohibitive rules concerning voluntary evidence, and in such cases a court order is not required.

The Hague Evidence Convention

The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad (The Hague Evidence Convention) is a further product of The Hague Conference on Private International Law. According to its preamble, its broad purpose is:[27]

> (a) the further improvement of the existing system of Letters of Request (set out in The Hague Conventions on Civil Procedure of 1905 and 1954);
> (b) enlarging the means for the taking of evidence by increasing the powers of consuls and by introducing, on a limited basis, the Anglo-American concept of a court-appointed commissioner; and
> (c) preserving all existing more favourable and less restrictive practices resulting from internal law or practice, or from bilateral or multilateral conventions.

The drafters of the Convention intended to devise methods of taking evidence abroad which "should be both acceptable to the state of execution and utilizable in the courts of the state of origin."[28] Canada is currently proceeding to make the necessary internal arrangements for accession to The Hague Evidence Convention.

The Convention applies to civil or commercial matters, and the comments relating to those terms in The Hague Service Convention are applicable to The Hague Evidence Convention. In many other respects The Hague Evidence Convention parallels The Hague Service Convention.

The Hague Evidence Convention contains mandatory provisions concerning the contents of letters of request. One such requirement is that all items of information to be supplied are to be contained in the letter of request itself. Letters of request are to be written in the language of the state of execution or be accompanied by a certified translation into that language. There is now also a recommended form for letters of request for use in conjunction with the Convention.

The general rule contained in the Convention is that the state of execution will execute the letter of request in conformity with its own internal procedures as if the matter were domestic litigation. This is usually done by the court appointing a special commissioner to execute the letter of request. There is an obligation on the state of execution to follow any "special method of procedure" specified in the letter of request. This does not apply, however, where

> (a) to do so would be incompatible with the internal law of the state of

execution; or
(b) it is impossible of performance by reason of the state's internal practice and procedure or by reason of practical difficulties.

Hong Kong Practice

Sections 75-77 of the Evidence Ordinance (Cap. 8) set out the Hong Kong regime for the taking of evidence on behalf of foreign courts. The procedure is amplified in Order 70 of the Rules of the Supreme Court (Supreme Court Ordinance-Cap. 4). Leave is required which is normally sought through an *ex parte* motion. The Crown Solicitor will make such an application where the Chief Secretary states that effect should be given to the request without requiring the appearance of the agent of any party to the foreign proceedings, or where the Registrar of the Supreme Court receives a request pursuant to a civil procedure convention.

The United Kingdom is a party to The Hague Evidence Convention and extended it to Hong Kong where it took effect 22 August 1978. The Registrar of the Supreme Court has been designated as the appropriate competent authority. The United Kingdom made a declaration under Article 18 to the effect that a foreign diplomatic or consular official could apply to the designated competent authority for assistance to obtain evidence by compulsion. A similar declaration was made for all British territories to which the Convention had been extended, except Hong Kong. The effect of this is that it is not open to a foreign consular official in Hong Kong, representing a state party to The Hague Evidence Convention, to apply for assistance to obtain evidence by compulsion. A parallel United Kingdom declaration under Article 16, concerning the waiving of permission for the taking of evidence on a non-compulsory basis by diplomatic and consular officers, was extended to Hong Kong.

Canada and Hong Kong

As between Canada and Hong Kong then, both jurisdictions have provisions in their domestic rules for the taking of evidence for use in a foreign tribunal. In addition, when Canada becomes a party to The Hague Evidence Convention, an additional channel will become available, subject of course to provision being made for Hong Kong's participation in the Convention to continue beyond 1997.

Recognition and Enforcement of Foreign Judgments

The recognition and enforcement of foreign judgments are more sensitive topics than either service abroad or the taking of evidence abroad. To

begin with, states have a tendency to protect themselves against the intrusion of foreign judgments. Thus, the concept of judicial assistance has not encompassed requests for the recognition and enforcement of foreign judgments. Moreover, the topic is not covered in the pre-World War II bilateral civil procedure treaties, and the post-War Hague Convention of 1 February 1971 on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters[29] has attracted very few parties. In short, enforcement of foreign judgments is an area in which states have found it appropriate to invest their own courts with a supervising authority.

Common Law of Recognition and Enforcement of Foreign Judgments

Generally a judgment *in personam* of a foreign court of competent jurisdiction is capable of recognition and enforcement in the common law provinces and territories of Canada. In order for this to happen, the foreign court must be held to have had jurisdiction according to Canadian conflict of laws rules.[30]

There are several conditions which go to the recognition of competent jurisdiction. The first of these is the residence or presence of the defendant in the territory. In Canada a foreign court will be found to have jurisdiction if, when the proceedings were commenced (i.e., the writ was issued), the defendant was resident or physically present within the country, state, or province of the foreign court.[31] If the defendant is a corporation, presence in the foreign territory is established if it can be shown that when proceedings were commenced, the corporation was "carrying on business" in that territory.[32]

The second of these conditions is the submission of the defendant to the jurisdiction of the foreign court. There is implicit submission when the defendant chose the forum[33] (e.g., where he was the plaintiff in the foreign action where judgment was rendered against him) or where he voluntarily appeared in the foreign action.[34] A voluntary appearance may take the form of appearing and pleading to the merits of the action, appearing to contest the jurisdiction of the court,[35] or appearing to protect property from seizure.[36] There may also be explicit submission by way of an exclusive jurisdiction clause in the contract on which the action is brought[37] or where the defendant has expressly agreed to accept service of process in the foreign jurisdiction. Any such agreement to submit to the jurisdiction of the foreign court will not be implied by an enforcing court: it must be express.[38]

A judgment pronounced by a foreign court of competent jurisdiction

is enforceable in Canada if it satisfies certain conditions: (1) that it is for a definite sum of money (not for taxes or penalties); (2) that it is final and conclusive;[39] (3) that it was not obtained by fraud;[40] and (4) that to recognize or enforce it would not be contrary to public policy.[41]

Canadian Reciprocal Enforcement of Judgments Acts

Every common law province and territory in Canada also has a statutory scheme providing for the enforcement of foreign judgments.[42] These schemes take the form of registration and are based on reciprocity. They provide that when a foreign judgment in a reciprocating jurisdiction has been made, the judgment creditor may, within six years of the date of judgment, apply to the Supreme Court of the province for an order that the judgment be registered. The order for registration may be made *ex parte* where the judgment debtor was either served personally in the original action or in some way submitted to the jurisdiction of the original court. In some provinces there is a requirement that before an order for registration will be made *ex parte*, the time for appeal must have expired, or there must be no appeal pending, or any appeal which was made must have been dismissed. Where the conditions for making an *ex parte* order for registration have not been met, reasonable notice of the application for registration must be given to the judgment debtor.

Once a court makes an order for registration, the foreign judgment is entered as a judgment of that court. From the date of registration, it is of the same force and effect as if it were a judgment of the registering court.

Conventions on the Recognition and Enforcement of Foreign Judgments

The Hague Conference on Private International Law prepared The Hague Convention of 1 February 1971 on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (The Hague Recognition and Enforcement Convention).[43] Neither Canada nor the United Kingdom are parties to this Convention. This Convention's scope excludes matters of family law, succession, bankruptcy, social security and questions relating to damage or injury in nuclear matters, and decisions for the payment of any customs duty, tax, or penalty. As of June 1991, although in force, only three states had ratified the Convention.[44]

There are other conventions in this field which may become of more importance. The 1968 E.E.C. Brussels Convention on the Jurisdiction and Enforcement of Judgments regulates these matters within Europe. Only EEC members are parties; thus, neither Canada nor Hong Kong are parties. In 1988 the EEC and the EFTA countries concluded the Lugano

Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.[45] It has yet to be ratified by the required number of states to bring it into force. The purpose of the Lugano Convention, as stated in the Preamble, is to "determine the international jurisdiction of the courts of the contracting states, and to facilitate recognition and introduce an expeditious procedure for securing enforcement of judgments, authentic instruments and court settlements." Interestingly, the Lugano Convention contemplates accession by non- EEC, non-EFTA states with consent.

Bilateral Conventions

Canada has one bilateral convention on the recognition and enforcement of judgments, that with the United Kingdom of 1984.[46] The purpose of this convention is to simplify procedures for the reciprocal enforcement of judgments between the two countries, and to limit the applicability of The Brussels Convention in the matter of enforcing in the United Kingdom judgments rendered against Canadians in other EEC countries on the basis of so called "exorbitant" assumptions of jurisdiction.[47] The implementing United Kingdom Order-in-Council extends Part I of the *Foreign Judgments (Reciprocal Enforcement) Act* of 1933 to Canadian judgments.[48]

The Order-in-Council makes no reference to Hong Kong, but it should be noted that Cap. 319 (see below) is the Hong Kong expression of the 1933 United Kingdom *Foreign Judgments (Reciprocal Enforcement) Act*, even to the extent that some definitions used in that *Act* are borrowed from and are referred directly to in s.2(1) of Cap. 319. As for the 1984 Convention between the United Kingdom and Canada, it could be extended only to those British territories to which the Brussels Convention could be applied, which would not include Hong Kong.

Hong Kong Practice

The practice in Hong Kong with regard to the recognition and enforcement of foreign judgments is very similar to that in Canada. In Hong Kong foreign judgments may be enforced either under the common law or pursuant to the statutory registration schemes contained in two ordinances: the Judgment (Facilities for Enforcement) Ordinance (Cap. 9), and the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319). Reference should also be made to Order 71 of the Rules of the Supreme Court of Hong Kong (Cap. 4).

Cap. 9 provides specifically for registration in the Supreme Court of

Hong Kong by a judgment creditor of any judgment of a superior court in the United Kingdom. This Ordinance could be extended to reciprocating Commonwealth jurisdictions, and it has been to a large number but apparently not to any Canadian jurisdictions. Cap. 319 was intended to apply to foreign, i.e., non-Commonwealth, jurisdictions, but in line with the trend to do away with separate Commonwealth regimes, it has increasingly been applied to Commonwealth countries as well. It has not been extended to any Canadian jurisdictions. The registration procedures of these Ordinances and the results under them are essentially identical to those under the statutory schemes in the common law provinces and territories of Canada.

In Hong Kong as in Canada, by virtue of the common law, a judgment creditor is entitled to bring a fresh action upon a foreign judgment. A foreign judgment will be entitled to recognition and enforcement in Hong Kong if it is a judgment *in personam* for a definite sum of money (not taxes or penalties) and the foreign court had the jurisdiction to make the judgment. The two grounds for competent jurisdiction are the residence or physical presence of the defendant in the foreign territory in which the judgment was obtained and the submission of the defendant to that foreign jurisdiction. At common law and under the Ordinances, the judgment must be final and conclusive as between the parties.[49]

Cap. 319 provides that a foreign judgment shall be deemed to be final and conclusive notwithstanding that there may be an appeal pending against it or that the time allowed for appeal may not have expired. In an important recent case, a judgment creditor attempted to enforce an Oregon judgment in Hong Kong by way of a fresh action.[50] An order for summary judgment was obtained. This was appealed on the grounds that the judgment creditor had failed to prove that the Oregon judgment was final and conclusive and that the judgment debtor was entitled to a set-off against the creditor's claim. The Hong Kong High Court held that since the judgment debtor had referred to the Oregon judgment as "final" in his own pleadings and there was no evidence to the contrary, the judgment was final and conclusive. The court also held that the defense of set-off was an attempt to impeach the Oregon judgment, which was not possible. The court dismissed the appeal and entered the judgment against the judgment debtor.

Canada and Hong Kong

At the present time the recognition and enforcement of judgments between Canada and Hong Kong have to be effected through common

law procedures. The respective statutory schemes have not been extended by either side to the other. There is no apparent explanation for this, other than perhaps the absence of a demand for it from the legal profession. Looking to 1997, an adoption of the laws process is under way which is likely to maintain the broad scheme of Hong Kong's present arrangements.

Foreign Arbitral Awards

There are arbitration Acts in all the common law provinces and territories of Canada.[51] These statutes vary on some points, but at a minimum they include provisions regarding the validity of the submission (the written agreement to submit present or future differences to arbitration), the power of the court to assist in the implementation of the arbitration (by staying court proceedings where there is a submission), and the enforcement of a domestic award in the same way as a judgment or order to the same effect.

The same Canadian statutory schemes, which cover the recognition and enforcement of foreign money judgments by way of registration, also cover foreign arbitral awards as long as those awards are enforceable in the same manner as a judgment given by a court in that jurisdiction. As is required for the recognition and enforcement of foreign judgments under reciprocal enforcement statutes, the jurisdiction in which the foreign award was obtained must have been declared to be a reciprocating jurisdiction.

In Hong Kong, Cap. 9 provides for the enforcement of foreign arbitral awards in the same manner as foreign judgments. Foreign arbitral awards may also be enforced by registration under the Arbitration Ordinance (Cap. 341).

Both Canada and Hong Kong are parties to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.[52] A foreign arbitral award for which enforcement is sought under this Convention will be enforced unless:[53]

> (a) the person against whom it is being enforced establishes that it or any other party to the arbitration agreement was under a legal incapacity;
> (b) the arbitration agreement was invalid;
> (c) proper notice of the arbitration proceedings and arbitrator(s) was not given, or the party was not given a full opportunity to present its case to the arbitration panel;

(d) the award falls outside the "terms of submission," or the composition of the arbitral tribunal was improper; or

(e) the award has not become final or has been set aside or suspended by an appropriate court.

Moreover, both Hong Kong and most Canadian jurisdictions have adopted the UNCITRAL Model Law of Arbitration, which also provides for the enforcement of foreign arbitral awards.

Foreign Maintenance Orders

While at common law a final judgment or order for spousal or child maintenance is enforceable as long as it has been made by a foreign court of competent jurisdiction, the process of enforcing such foreign judgments is time consuming and expensive. Each of the common law provinces and territories of Canada have enacted reciprocal enforcement of maintenance orders legislation to facilitate the enforcement of spousal or child maintenance orders made in reciprocating states.[54] Such a legislative scheme is in place in Hong Kong as well, in the form of the Maintenance Order (Reciprocal Enforcement) Ordinance (Cap. 188).[55]

Generally, such legislation covers both a final order, one where the court making the order has jurisdiction over the respondent when the order is made, and a provisional order, where the Court does not have jurisdiction over the respondent when making the order. If the respondent resides in a reciprocating state, the order may be registered there and enforced as if it had been made in that state.

Such legislation typically provides for several alternative approaches: (1) the registration of final orders made by courts in reciprocating states where the respondent has become a resident of the registering state; (2) the confirmation of provisional orders made in reciprocating states; and (3) the making of provisional orders against individuals resident in reciprocating states, for confirmation by the courts of those states.

As with other reciprocal enforcement of judgments legislation, the key to the operation of these legislative schemes is reciprocity. This is usually done by regulation or Order-in-Council once the governments are satisfied that conditions of sufficient reciprocity exist. At present, the provinces of British Columbia, Saskatchewan, and Manitoba have declared Hong Kong to be a reciprocating state, and Hong Kong has, in turn, designated those three provinces to be reciprocating states. Being a scheme based on reciprocal legislation rather than on international agreement, the existing arrangements should not be affected by 1997.

Hong Kong and the Impact of 1997

As has been noted, both The Hague Service Abroad Convention and The Hague Evidence Convention were extended to Hong Kong by the United Kingdom. For its part, the People's Republic of China is a member of The Hague Conference and has very recently acceded to The Hague Service Convention. With regard to The Hague Evidence Convention, the question arises, as it does in the case of other multilateral conventions which currently apply to Hong Kong but to which the PRC is not a party, as to how Hong Kong's participation can be maintained. Should the PRC become a party by 1997, then the problem disappears. That, of course, would be the simplest solution. Should it not, then there would seem to be at least two other courses of action. The United Kingdom might reach agreement with the PRC under which the latter would apply various Hague Conventions to the Hong Kong Special Administrative Region. Such an agreement could then be circulated to states party to the Conventions with a period specified for objections. It seems unlikely there would be any objections. Finally, the Agreement could be registered with the United Nations. A totally different solution would be for the PRC simply to make a unilateral declaration that the Conventions would be applied in Hong Kong. This should be accompanied, ideally, by some process by which states parties would give their consent, explicit or implicit.

A seemingly more difficult situation arises in the case of the enforcement of judgments because of the absence of effective multilateral arrangements. The United Kingdom has a number of bilateral agreements which have been extended to Hong Kong, and there are reciprocal enforcement regimes in effect—but, as has been noted, not with Canadian jurisdictions. For a variety of reasons, the bilateral agreement route may be the most appropriate in this area. The straight forward solution would be for Hong Kong to be duly authorized by the United Kingdom to conclude bilateral agreements, which the PRC would authorize to continue in force for the Hong Kong Special Administrative Region, as envisaged in Section 3, Annex 1 of the Joint Declaration.

Conclusion

Cooperation among states in the field of international civil procedure is clearly a patchwork of domestic bilateral and multilateral rules. In general, the trend appears to be towards multilateral regimes, a trend that is admittedly more pronounced on some topics than on others.

In the context of the Canada-Hong Kong relationship, there are areas

of international civil procedure that could usefully be expanded now, particularly in the case of reciprocal legislative schemes that for one reason or another have not been extended or not widely extended between Hong Kong and Canadian jurisdictions. More importantly, however, looking to 1997, Hong Kong will have to have in place arrangements with its principle partners at least, that carry over at a minimum its existing network of civil procedure arrangements. That it should be able to do so is clearly set out in the Joint-Declaration. Only the mechanics have to be defined. However, time is pressing and progress in the Joint Liaison Group seems to be painfully slow. Some new approach may be needed to ensure that all the appropriate arrangements can be put in place by 1 July 1997.

Notes and References

1. The author wishes to acknowledge the major contribution made to the preparation of this paper by his research assistant, Michael Loken, U.B.C., Faculty of Law.

2. See, for example, G.C. Cheshire and P.M. North, *Private International Law*, 11th ed. (London: Butterworths, 1987); J.-G. Castel, *Canadian Conflict of Laws*, 2nd ed. (Toronto: Butterworths, 1986); External Affairs Canada, *International Judicial Cooperation* (Ottawa, 1987).

3. *Colt Industries Inc. v. Sarlie*, [1966] 1 All E.R. 673 (C.A.). Many of the authorities referred to in this paper are English. Canada is a common law jurisdiction, and so has received the English Common law, except for the province of Québec. While English authorities are not strictly binding upon Canadian courts, they are highly persuasive.

4. *Common Law Procedure Act*, 1852, 15 & 16 Vict., c. 76, ss. 18 & 19. All English civil and criminal laws as they existed on 19 November 1858 are in force in the common law provinces and territories of Canada, insofar as they are not inconsistent with local circumstances (e.g., *Law & Equity Act*, R.S.B.C. 1979, c. 224).

5. Conférence de la Haye de Droit International Privé, Recueils des Conventions (1951-1980), p. 76. Appendix A lists those states which are parties to the Convention.

6. [1990] 1 A.C. 723.

7. Ibid., Preamble, p. 77.

8. See Articles 11 and 19 of the Convention.

9. See attached Appendix B for a list of these treaties.

10. R.M. Wilkinson, "Developments in the Civil Process," in *The Law in Hong Kong*, ed. R. Wacks (Hong Kong: Oxford University Press, 1989), p. 126.

11. *National Telefilm Associates Inc. v. United Artists' Corp. et al.*, (1958), 14 D.L.R. (2d) 343 (Ont. C.A.).

12. *Appeal Enterprises v. First National Bank of Chicago*, (1984), 10 D.L.R. (4th) 317 (C.A.).

13. R.S.C. 1970, c. E-10, as amended.

14. See Appendix C for a list of these statutes.

15. For example, *Evidence Act*, R.S.B.C. 1979, c. 116, s. 59.

16. *National Telefilm Associates Inc. v. United Artists' Corp. et al.*, (1958), 14. D.L.R. (2d) 343 (Ont. C.A.).

17. Castel, *Canadian Conflict of Laws*, p. 128.

18. *Radio Corp. of America v. Rauland Corp. et al.*, [1956] O.R. 630.

19. *Re A.G. Becker Inc.*, (1984), 45 C.P.C. 163 (Ont. H.C.).

20. *Re Westinghouse Electric Corp. and Duquesne Light Co. et al.*, (1977), 78 D.L.R. (3d) 3.

21. *Clarkson & Co v. Rockwell Int. Corp.*, (1979), 11 C.P.C. 288 (Ont. H.C.).

22. Castel, *Canadian Conflict of Laws*, p. 128.

23. *Re Request for International Judicial Assistance*, [1980] 1 W.W.R. 7 *sub nom. Re Application by Letters Rogatory from United States District Court, Middle District of Florida, Tampa Division.*

24. *Radio Corp of America v. Rauland Corp. et al.*, [1956] O.R. 630.

25. *Gulf Oil Corp. v. Gulf Canada Ltd.*, [1980] 2 S.C.R. 39.

26. *National Telefilm Associates Ind. v. United Artists' Corp. et al.*, (1958), 14 D.L.R. (2d) 343 (Ont. C.A.).

27. Conférence de la Haye de Droit International Privé, Recueils des Conventions (1951-1980), p. 152.

28. Conférence de la Haye de Droit International Privé, Actes et Documents de la Onzième Session, Tome IV, Obtention des Preuves à L'Éntranger 202 (1970).

29. Conférence de la Haye de Droit International Privé, Recueils des Conventions (1951-1980), p. 106.

30. *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670 (P.C.); *Re Tangye and Smith Ltd. v. The Pelican Carbon Company of Canada*, [1935] O.R. 123 (Ont. H.C.).

31. *Schibsby v. Westenholz*, (1870), L.R. 6 Q.B. 155; *Re McCain Foods Ltd. and Agricultural Publishing Co. Ltd. et al.*, (1979), 103 D.L.R. (3d) 724.

32. *Morguard Invt. Ltd. v. De Savoye*, (1990), 52 B.C.L.R. (2d) 160 (S.C.C.).

33. *Emanuel v. Symon*, [1908] 1 K.B. 302.

34. *Re Overseas Food Importers & Distributors and Brandt*, (1981), 27 B.C.L.R. 31 (C.A.).

35. *Henry v. Geoprosco International*, [1976] Q.B. 726.

36. *Clinton v. Ford*, (1982), 37 O.R. (2d) 448 (C.A.).

37. *Batavia Times Publishing Co. v. Davis*, (1978), 18 O.R. (2d) 252; aff'd 26 O.R. (2d) 800n.

38. *Vogel v. R. & A. Kohnstamm Ltd.*, [1973] 1 Q.B. 133.

39. *Lear v. Lear*, [1973] 3 O.R. 935.

40. *Godard v. Gray*, (1870), L.R. 6 Q.B. 139; *Four Embarcadero Center Venture et al. v. Kalen et al.*, (1988), 65 O.R. (2d) 551 (Ont. H.C.).

41. *Shell Co. of Hong Kong v. May*, [1979] 2 W.W.R. 443 (B.C.S.C.).

42. See attached Appendix C for a list of these statutes.

43. Conférence de la Haye de Droit International Privé, Recueils des Conventions (1951-1980), p. 124.

44. 27 I.L.M. 277 (1988).

45. Official Journal of the European Communities, No. L319/9 (25/11/88).

46. S.C. 1984, c. 32.

47. Castel, *Canadian Conflict of Laws*, p. 271.

48. Reciprocal Enforcement of Foreign Judgments (Canadian) Order 1986. (1986 No. 2027).

49. C. Platto, ed., *Enforcement of Foreign Judgements Worldwide*, (London: Graham & Trotman, 1989), p. 39.

50. *Caffall Brothers Forest Products Inc. v. Chie Ku-yin ta Sin Lie International Enterprises*, [1987] H.K.L.R. 92.

51. See attached Appendix F for a list of these statutes.

52. The text appears as a Schedule to c. 21, S.C. 1986. The Convention has been extended to Hong Kong by the United Kingdom.

53. K. Simmonds and B. Hill, *International Commercial Arbitration: Commercial Arbitration Law in Asia and the Pacific* (Dobbs Ferry, NY: Oceana, 1987), pp. 34-35.

54. See Appendix G for a list of these statutes. For a description of recent developments in this field within the Commonwealth, see Justice Fuad, "Enforcement of Maintenance Orders in the Commonwealth," in *Papers of the 7th Commonwealth Law Conference*, Hong Kong, September 1983.

55. See G. Gold et al., "Death of an Astronaut's Marriage," in *Guide to Canada-Hong Kong Business 1991*, ed. J.A. McInnis (Hong Kong: Canada Festival Corporation), 1991, p. 223 *et seq.*

Appendix A

The Hague Conference on Private International Law

Status Chart on Canadian and Hong Kong Participation in The Hague Civil Procedure Conventions as of May 1991

Convention	Canadian Participation	Hong Kong Participation
Convention Abolishing the Requirements of Legalization of Foreign Public Documents (1961)	Under consideration	Party
Convention on The Conflict of Laws Relating to the Form of Testamentary Dispositions (1961)	———	Party
Convention on The Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1965)	Party	Party
Convention on the Taking of Evidence Abroad in Civil and Commercial Matters(1970)	Under consideration	Party
Convention on the Recognition of Divorce and Legal Separations (1971)	———	Party
Convention on the Civil Aspects of International Child Abduction (1980)	Party	———
Convention on the Law of Trusts and on Their Recognition (1985)	Signed but not ratified	Party
Convention on the Law Applicable to Succession to the Estates of Deceased Persons (1988)	Under consideration	———

Appendix B

States with which Canada has a civil procedure convention

Austria	1935 C.T.S., No. 16
Belgium	1928 C.T.S., No. 16
Czechoslovakia	1928 C.T.S., No. 17
Denmark	1936 C.T.S., No. 4
Finland	1936 C.T.S., No. 5
France	1928 C.T.S., No. 15
Germany	1935 C.T.S., No. 11
Greece	1938 C.T.S., No. 11
Hungary	1939 C.T.S., No. 6
Iraq	1938 C.T.S., No. 12
Italy	1935 C.T.S., No. 14
Netherlands	1936 C.T.S., No. 2
Norway	1935 C.T.S., No. 15
Poland	1935 C.T.S., No. 18
Portugal	1935 C.T.S., No. 17
Spain	1935 C.T.S., No. 12
Sweden	1935 C.T.S., No. 13
Turkey	1935 C.T.S., No. 19
Yugoslavia	1939 C.T.S., No. 4

Appendix C

List of Provincial Evidence Acts

Alberta, R.S.A. 1980, c. A-21
British Columbia, R.S.B.C. 1979, c. 116
Manitoba, R.S.M. 1987, c. E150
Newfoundland, R.S.N. 1970, c. 115
New Brunswick, R.S.N.B. 1973, c. E-11
Northwest Territories, R.O.N.W.T. 1974, c. E-4
Nova Scotia, R.S.N.S. 1989, c. 154
Ontario, R.S.O., c. 145
Prince Edward Island, R.S.P.E.I., 1974, c. E-10
Saskatchewan, R.S.S. 1978, c. S-16
Yukon Territory, R.S.Y.T. 1986, c. 57

Appendix D

List of Provincial Enforcement of Judgments Acts

Alberta, R.S.A. 1980, c. R-6
British Columbia R.S.B.C. 1979, c. 75
Manitoba, R.S.M. 1987, c. J-20
Newfoundland, R.S.N. 1970, c. 327
New Brunswick, R.S.N.B. 1973, c. R-3
North West Territories, R.O.N.W.T. 1974, c. R-1
Nova Scotia, S.N.S. 1973, c. 13
Ontario, R.S.O. 1980, c. 432
Prince Edward Island, R.S.P.E.I. 1974, c. R-7
Saskatchewan, R.S.S. 1978, c. R-3
Yukon Territory, R.S.Y.T. 1986, c. 146

Appendix E

List of Provincial Arbitration Acts

Alberta, R.S.A. 1980, c. A-43
British Columbia, S.B.C. 1986, c. 3
Manitoba, R.S.M. 1970, c. A-120
New Brunswick, R.S.N.B. 1973, c. A-10
Newfoundland, R.S.N. 1970, c. 187
North West Territories, R.O.N.W.T. 1974, c. A-4
Nova Scotia, R.S.N.S. 1989, c. 19
Ontario, R.S.O. 1980, c. 25
Prince Edward Island, R.S.P.E.I. 1974, c. A-14
Saskatchewan, R.S.S. 1978, c. A-24
Yukon Territory, C.O.Y.T. 1976, c. A-2

Appendix F

List of Provincial Reciprocal Enforcement of Maintenance Orders Acts

Alberta, R.S.A. 1980, c. R- 7.1
British Columbia, R.S.B.C. 1979, c. 121
Manitoba, R.S.M. 1987, c. M-20
Newfoundland, R.S.N. 1970, c. 224
New Brunswick, R.S.N.B. 1973, c. R-4
North West Territories, R.O.N.W.T. 1974, c. M-4
Nova Scotia, S.N.S. 1983, c. 7
Ontario, S.O. 1982, c. 9
Prince Edward Island, S.P.E.I. 1983, c. 39
Saskatchewan, S.S. 1983, c. R-4.1
Yukon Territory, S.Y.T. 1980 (1st), c. 25

Appendix G

List of Hong Kong Ordinances referred to in this paper

Cap. 4	Supreme Court Ordinance (includes Supreme Court Rules)
Cap. 8	Evidence Ordinance
Cap. 9	Judgments (Facilities for Enforcement) Ordinance
Cap. 188	Maintenance (Reciprocal Enforcement) Ordinance
Cap. 319	Foreign Judgments (Reciprocal Enforcement) Ordinance
Cap. 341	Arbitration Ordinance

Extradition Between Hong Kong and Canada: Post-1997

Janice Brabyn

The numbers of persons extradited from Hong Kong to Canada or vice versa have so far not been large, for example, only one each way since January of this year. As Canada's Asian population increases, extradition between Hong Kong and Canada can also be expected to grow. However, this must be subject to the resolution of a major uncertainty common to all of Hong Kong's extradition relationships: will extradition from or to Hong Kong be a legal/practical possibility after 1 July 1997? It is the possible resolution of this uncertainty which is the focus of this paper.

Extradition may be defined as a formal process for the surrender of fugitives, convicted or accused, from the jurisdiction of refuge to the jurisdiction of trial for the purpose of punishment or prosecution. It requires at least a legal power to surrender (extradite) on the part of the jurisdiction of refuge. A legal power to request surrender of fugitives from other jurisdictions is an invariable correlate. In practice, the existence of reciprocal obligations is almost always insisted upon as well.

The Present

Hong Kong's current legal powers to surrender fugitives to other jurisdictions are provided by the Fugitive Offenders (Hong Kong) Order 1967,[1] which governs extradition to and from jurisdictions within the Commonwealth, including Canada;[2] Schedule 1 of the Extradition Act 1989;[3] the Extradition (Hong Kong) Ordinance 1875, a strictly administrative ordinance passed pursuant to section 18 of the Extradition Act 1870 and to be read as part of the Extradition Act in Hong Kong;[4] and the Chinese Extradition Ordinance 1889.[5] The power to request the surrender of fugitives to Hong Kong by other jurisdictions is an aspect of the prerogative delegated to the Governor of Hong Kong.[6] Reciprocal obligations exist by virtue of designation orders made under the Fugitive Offenders (Hong Kong) Order 1967, cited above, and a large number of United Kingdom bilateral and multilateral treaties embodied in various Orders in Council applicable to Hong Kong.[7]

The Problem

It is evident from the above that, apart from the now obsolete Chinese

Extradition Ordinance 1889, Hong Kong's present extradition powers and relations are all direct consequences of, and dependent upon, its colonial status. Loss of that colonial status would mean loss of present extradition powers and relations as well. This need not cause concern if something is done which enables the present powers and relations to be carried forward into the new era, or at least comparable extradition powers and relations will be inherited from the PRC, or a completely new set of comparable extradition powers and relations can and will be substituted.

"Carrying forward," the solution to similar problems adopted by many ex-colonies emerging into independent statehood, is not an option for Hong Kong. It is clear from both the Joint Declaration and the Basic Law that United Kingdom legislation of any kind will not continue in force in the Hong Kong SAR.[8] The Hong Kong SAR will not become a member of the Commonwealth of Nations and so cannot expect to benefit from designation by participants in the Commonwealth Fugitive Offenders Scheme 1966. Neither the PRC nor the HKSAR will succeed to the United Kingdom treaties.

Inheritance from the PRC is also unsatisfactory. China has ratified several multilateral conventions containing "extradite or prosecute" options,[9] but has no bilateral extradition treaties. Consequently, the extradition relations which the Hong Kong SAR may inherit from the PRC are limited. Inheritance of extradition powers also presents a difficulty. China does not currently have any extradition statute or other written extradition law. Although PRC law apparently treats the previously mentioned multilateral treaties as self-executing and, hence, a sufficient basis for extradition in themselves, present Hong Kong law, and in this respect also the future law of the HKSAR, demands a statutory basis for any lawful power to extradite.[10] Neither common law nor executive prerogative is sufficient.

There remains the option of substitution of a new set of extradition powers and relations, either independently or with the authority and assistance of the United Kingdom and/or the PRC. It is this option which is explored below.

A New Extradition Order for the HKSAR?

The creation of extradition relations with foreign jurisdictions is essentially the exercise of treaty making power traditionally regarded as one of the preserves and privileges of independent sovereignty. Even the power to surrender persons lawfully within a jurisdiction into the custody of a

foreign jurisdiction is not normally enjoyed by less than sovereign entities. If Hong Kong (British Overseas Territory) is to acquire powers to grant extradition and create extradition relations before 1997, the authorization and cooperation of the United Kingdom is needed. Only the UK can ensure that the territory has the legal power to enact its own extradition legislation before 1997, make its own surrender decisions and applications without interference, and negotiate extradition arrangements with other jurisdictions on its own behalf. If the Hong Kong SAR is to enjoy similar benefits after 1 July 1997, the PRC must likewise concede these powers to the future HKSAR, preferably by means of express provision within the Basic Law but perhaps otherwise. At the very least, compatibility between the grant of such powers and the Basic Law is required.

Has this or will this be done? Four preliminary questions must be answered.

1. Does Hong Kong have the legal power to enact its own extradition legislation now?

We know that Hong Kong's present extradition powers are given by Imperial legislation and orders, but need this necessarily have been so? The Governor, "by and with the advice of the Legislative Council, may make laws for the peace, order, and good government of" Hong Kong.[11] This very broad grant of legislative power is subject to four external limitations: repugnancy to an Act of the United Kingdom Parliament applicable to Hong Kong or to any subordinate legislation made under the authority of such an Act;[12] repugnancy to the Letters Patent;[13] repugnancy to non-statutory Orders in Council applicable to the territory;[14] exclusion as subject matter of those aspects of the prerogative which are "attributes inherent in and essential to the Crown's authority in the colony";[15] as well as its own express boundaries. For completeness, it is worth noting that some bills must be reserved for the royal assent,[16] and the Crown reserves the right of disallowance.[17]

Of the external limitations, only the first is relevant here. Any local legislation of a substantial nature would inevitably be repugnant to the existing Acts of Parliament and statutory Orders in Council already mentioned.[18] These must be repealed, a power now given to the Governor of Hong Kong by and with the advice and consent of the Legislative Council.[19]

As to the boundaries of the phrase itself, legislation having extraterri-

torial effect but no "real or substantial relation to"[20] the "peace, order and good government of the colony" is excluded. There are early judicial and executive statements to the effect that this formula does not permit the enactment of extradition legislation by a colonial legislature[21] and differences of opinion as to whether this state of affairs generally prevails.[22] However, with respect to Hong Kong, at least in the context of extradition, the point is academic. As of 27 March 1989 the legislature of Hong Kong has had the power "...to the extent required in order to give effect to an international agreement which applied to Hong Kong, and for connected purposes....(b) [to] make laws having extra-territorial operation."[23] There is no *ultra vires* difficulty, provided the precaution of first repealing the United Kingdom legislation as it applies to Hong Kong is taken.

2. Does Hong Kong have the legal power to create extradition relations with foreign jurisdictions?

As the government of a ceded colony, the government of Hong Kong only enjoys such powers with respect to Hong Kong as the Crown, either directly or through Parliament, has seen fit to grant it. A general treaty making power has never been granted. However, specific powers have been conferred, for example in the area of air services agreements.

With respect to extradition, the Fugitive Offenders (Hong Kong) Order gives the Governor power to designate Commonwealth states to which the Order will apply, but only subject to the approval of the United Kingdom Secretary of State. This power has been used regularly.[24] More recently, the Governor has been entrusted with authority to negotiate extradition arrangements with other jurisdictions, with a view to such arrangements being implemented by domestic statute and continuing to have effect after the 1 July 1997 transition. The initialing of the first agreement negotiated under this power, an agreement with the Netherlands, was recorded in the *Sunday Morning Post* of 9 June 1991. The background to the grant of this negotiating power is discussed below.

3. Does the Basic Law grant similar powers to the HKSAR?

In the Texts

(a) As to the creation of extradition relations:

Extradition is not expressly mentioned in either the Joint Declaration or the Basic Law. As to whether the Government of the Hong Kong SAR or

the Central People's Government will have jurisdiction, both documents are suggestive but in the final analysis ambiguous and inconclusive.

Clause 2 of the Joint Declaration in part provides, that the Hong Kong SAR "...will enjoy a high degree of autonomy, except in foreign...affairs which are the responsibility of the Central People's Government." The first sentence in article 13 of the Basic Law is to like effect. Taken in isolation, these provisions would suggest that at least the power to create and maintain extradition relations with foreign jurisdictions is to be retained by the Central People's Government.

However, the position is elaborated in the Joint Declaration, Appendix I, paragraph I. "The Central People's Government shall authorise the Hong Kong Special Administrative Region to conduct on its own those external affairs specified in Section XI of this Annex." Section XI includes the following:

> The Hong Kong Special Administrative Region may on its own, using the name 'Hong Kong, China,' maintain and develop relations and conclude and implement agreements with states, regions and relevant international organisations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields.

It is important to note that this list of "appropriate fields" does not purport to be exhaustive. By implication, the Central People's Government reserves to itself the right to approve other appropriate fields as it sees fit.

The remainder of article 13 and article 151 of the Basic Law essentially reproduces this format. The relevant part of article 13 provides: "The Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law." Article 151 follows the passage from Section XI of Annex I, quoted above, almost verbatim.[25]

Further, the Basic Law does contain express grants of responsibility for certain specific aspects of external affairs to the Hong Kong SAR. Most significant in the context of this paper is article 96, which gives effect to the last sentence of section III of Annex I of the Joint Declaration.

> With the assistance or authorization of the Central People's Government, the Government of the Hong Kong Special Administrative Region may make appropriate arrangements with foreign states for reciprocal juridical assistance.

At the very least, this provision indicates a willingness on the part of the National People's Congress to include reciprocal judicial assistance—that is, assistance in obtaining evidence, service of process, and enforcement of judgments in civil cases—as an "appropriate field" or "relevant" aspect of external affairs. From judicial cooperation in civil proceedings to judicial cooperation in criminal matters, specifically in securing physical control over convicted or accused fugitives, would not be an impossible leap.

However, in reality a leap of any kind may not be necessary. The phrase consistently used in the official English texts is "juridical assistance," not the traditional "judicial assistance" just mentioned. The significance of the use of "juridical" in the corresponding provision of the Joint Declaration has been considered by this author in some detail elsewhere.[26] Briefly, juridical may be defined as "relating to the administration of justice or office of a judge,"[27] a potentially wider term than "judicial," defined in the same source as "belonging to the office of a judge." Hence, juridical assistance could include extradition, even of the form found in the PRC which is strictly administrative, requiring no involvement on the part of the judicial organs at all. Was the term deliberately selected by the drafters of the Joint Declaration and the English translation of the Basic Law, with extradition in mind?[28]

The author has been unable to obtain a definitive answer to this question. The authentic Chinese texts are inconclusive. The characters used in both the Joint Declaration and the Basic Law, *sin fa* in each case, are variously translated by legal dictionaries as either "judicial" in its strict sense or "juridical", that is, "relating to law," depending upon context. The context in article 96 is apparently compatible with either meaning.

There is very little discussion of the predecessors of article 96 in documentation produced by either the Secretariat of the Drafting Committee for the Basic Law or the Secretariat of the Consultative Committee. In the former, the only reference found was in a "Collection of Documents of the Fifth Plenary Session of the Drafting Committee," dated 22 August 1987. In a Progress Report of the Subgroup on Political Structure, the view of one member was recorded

> the present notary system was both a juridical issue and an issue which involved external affairs. After the establishment of the HKSAR, the appointment of notary publics should be made by the Central Government.

Presumably a person holding such a view would also be concerned about

the external affairs aspects of extradition, had these been brought to her/his attention. Does an absence of comment suggest that it was not?

The Consultative Committee appears not to have discussed extradition with foreign states at all. However, some reference was made to extradition under what is now article 95. Mainland drafters are recorded as having said:

> According to Article [95], the extradition of suspects between China and Hong Kong shall be arranged by the judicial organs of the HKSAR with their counterparts in other parts of the country. Questions concerning criminal law, civil law and procedural law shall be handled in accordance with the legal provisions of Hong Kong. Mainland laws shall not apply.

This might be said to support the view that extradition is also contemplated within article 96, but the argument is not strong. It is true that the English text of article 95 also contains the word "juridical," and the Chinese characters *sin fa* are used again. However, the complete phrase in the English text of article 95 is "juridical relations," not "reciprocal juridical assistance." The Chinese characters accompanying *sin fa* reflect this linguistic distinction. Of course, it may be argued that these two terms actually mean the same thing or, at least, are both capable of including extradition within their boundaries. However, the contrary can also be asserted. In truth, neither English nor Chinese legal culture recognizes these phrases as terms of art and, in all likelihood, very little attention, if any, was paid to the distinctions between them.

Are there any other textual pointers indicating what the drafters intentions with respect to extradition may have been? So far, discussion has centred upon the external affairs/political aspects of extradition but equally, if not more, important is the character of extradition as an integral part of criminal justice systems. It is for this reason that the second sentence in article 14 of the Basic Law, reflecting article 3, paragraph (11) of the Joint Declaration, is significant: "The Government of the Hong Kong Special Administrative Region shall be responsible for the maintenance of public order in the Region."

(b) As to the power to enact extradition legislation:

With respect to both the Joint Declaration and the Basic Law, if it is concluded that extradition is either not an aspect of external affairs at all or is in any case an appropriate field for delegation of responsibility to the Hong Kong SAR government, there is nothing in the text to suggest otherwise than that the SAR government would then be free to enact such extra-

dition legislation as it saw fit. Articles 8 and 17 of the Basic Law invalidate legislation which contradicts the Basic Law itself. Article 17 in particular provides:

> If the Standing Committee of the National People's Congress...considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the Standing Committee may return the law in question.... Any Law returned by the Standing Committee of the National People's Congress shall immediately be invalidated.

Provided the division of powers between the Central and Region government is respected, it appears that there are no other substantive restrictions on the Region's legislative powers.

Note also that only specified PRC laws listed in Annex III are to apply in the Region.[29] No law concerning extradition is included amongst these.

In Practice

The future of extradition to and from Hong Kong after 1 July 1997 has been a matter of concern and active discussion at least since 1988, probably considerably earlier. On 23 July 1988 the *South China Morning Post* reported that, "Members of the Sino-British Joint Liaison Group are to discuss extradition procedures for Hong Kong and foreign countries at a two-day meeting beginning today." This was a meeting of a sub-group intended to make preparations for discussion of the topic by the full Joint Liaison Group (JLG) the following month. On 11 October 1988 the *Hong Kong Standard* reported extracts from interviews with British and Chinese sources as to the agreement reached at that, the 10th Meeting of the Joint Liaison Group.

> 'A very important principle has been reached which will give Hongkong the right to negotiate with third countries for the return of fugitive offenders,' a British source said.... It will mean that China will honour all the extradition agreements agreed between Hongkong and all other countries, including those reached during the transition period.... 'After 1997, all agreements will have authorisation from China and there will be some form of entrustment from the United Kingdom pre-1997,' a British source said.

Further progress as to details was reported in communiques published after the eleventh and sixteenth meetings of the JLG.

> The two sides reached agreement in principle on the detail of future arrangements for the surrender of fugitive offenders between Hong Kong and relevant countries. The Group looked forward to the negotiation of appropriate arrangements at an early date.

As already noted above, pursuant to this agreement, the United Kingdom government has entrusted the Governor—in practice, members of the International Law Division of the Legal Department—to negotiate extradition agreements with foreign jurisdictions on Hong Kong's behalf. Members of the Legal Department involved in these negotiations confirmed to the writer that a Model Extradition Agreement had been hammered out in joint discussions with the PRC and UK officials. This document will be used as the starting point for negotiations with states acceptable to the Chinese Central Government. As reported in the *Sunday Morning Post* of 9 June 1991 previously cited, these countries included the Netherlands, Malaysia, the United States, Canada, and Australia. If an initialed text is obtained, this will be returned to the JLG for discussion and approval. Nothing can be finalized without the approval of the PRC, which is essential in order to ensure the agreements will be permitted to remain in force after 1997. In this context it is significant that article 153 of the Basic Law, based on a sentence in section XI of Annex I of the Joint Declaration, provides:

> International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region.

It is understood that this provision, together with articles 13, 96, 151, and perhaps 20, is relied upon by all parties as a sufficient basis within the Basic Law to justify this devolution of "external affairs/sovereign" power to the Region, a devolution regarded as desirable and practical by all sides.

Once PRC approval has been obtained, it is intended that the new agreement will be registered under Article 102 of the United Nations Charter.[30] It is also intended that Hong Kong will enact its own extradition ordinance before 1997, providing a single extradition process for all foreign jurisdictions, Commonwealth or otherwise, designed specifically to facilitate implementation of any agreements obtained. Since articles 8 and 18 of the Basic Law provide that ordinances in force in Hong Kong on 30 June 1997 shall continue in force on 1 July 1997, a domestic extradition law will remain in force and effective notwithstanding the transition.

4. Will extradition to Hong Kong be a practical possibility after 1 July 1997?

Most of what has gone before has concerned extradition from Hong Kong. This must be the area of gravest concern to the Central Government since it involves not only diplomatic dealings with foreign states, a characteristic shared with extradition to Hong Kong as well, but also the arrest, detention, and surrender of persons otherwise lawfully upon Chinese territory. However, foreign states are more likely to be concerned about the probable fate of persons returned by them to the Hong Kong SAR. They will look to the extradition law itself to see whether it provides appropriate safeguards, such as speciality and non-resurrender clauses. They may seek specific undertakings from the Chief Executive that if a fugitive is returned, specified things will or will not happen. At the time of initial negotiations, at least they will be looking at the proposed legal system of the Hong Kong SAR, including its internal structure and relation to the Central Government of the People's Republic of China. Thus, they can satisfy themselves that laws enacted or undertakings given are, in fact, likely to be effective, complied with, or carried out.

Speciality and no-resurrender safeguards are common in extradition agreements, statutes, and practices. A speciality safeguard is designed to prevent prosecution and/or punishment of surrendered persons by the requesting jurisdiction, either with respect to conduct other than that upon which the surrender by the requested jurisdiction was based (at least without the prior consent of the requested jurisdiction) or for offenses, such as political offenses, with respect to which the laws of the requested jurisdiction would have forbidden extradition in any case.

Of course, a speciality safeguard is not intended to protect returned persons from prosecution or punishment with respect to conduct which occurs after their arrival in the requesting jurisdiction. Furthermore, a speciality safeguard need not provide a surrendered person any protection at all if such person freely remains within the requested jurisdiction after either a fixed period of days or provision of a reasonable opportunity to leave.

A non-resurrender safeguard is designed to ensure that a person surrendered by Jurisdiction A to Jurisdiction B is not re-surrendered by Jurisdiction B to Jurisdiction C, either without the prior consent of Jurisdiction A or before the surrendered person has had an adequate opportunity to leave Jurisdiction B as indicated above.

It is intended that the extradition legislation eventually enacted by the

Hong Kong SAR will include a sufficient speciality safeguard. This will be in the form of a statutory restriction upon prosecution or punishment of persons surrendered to Hong Kong, probably not unlike that imposed by section 33 of the Canadian Extradition Act, R.S.C. 1970, c. E-21 or section 18 of the Extradition Act 1989 (UK). Statutory prohibitions are likely to be supplemented by reciprocal undertakings included in any extradition agreement entered into or by guarantees demanded from requesting jurisdictions where ad hoc extradition is contemplated.

Non-resurrender safeguards are not universally required by surrendering jurisdictions, and so are more commonly found within negotiated agreements only or as specific undertakings in particular cases. Such a safeguard is likely to be important to the Hong Kong SAR's future extradition partners who may be anxious to ensure that persons surrendered to Hong Kong are not thereafter re-surrendered to some other jurisdiction within the People's Republic of China, with a very different criminal justice system comparatively unfamiliar to the requested jurisdiction.[31] For this reason it may be worthwhile imposing a legislative restriction on resurrender in the local legislation or, at least, giving the Chief Executive an express legislative power to give undertakings of no resurrender to foreign jurisdictions. Such undertakings should be made enforceable in Hong Kong courts.

As to the probable characteristics of the future Hong Kong SAR's criminal justice system, it was clearly the intention of the makers of the Joint Declaration and of the Basic Law drafters that the Region should maintain its own criminal justice system, with exclusive jurisdiction to prosecute and punish persons accused of having committed offenses against the Region's laws within the Region's jurisdiction. So article 8 of the Basic Law provides that the laws in force in Hong Kong on 30 June 1997, including the common law and ordinances, will remain in force provided only they do not contravene the Basic Law. Subject to compliance with due process guarantees in the Basic Law, this qualification will cause no problem here. Furthermore, article 18 provides that only national laws which (i) relate to defense and foreign affairs, and (ii) are listed in Annex III of the Basic Law, shall apply in the Hong Kong SAR. Thus, the criminal law applicable to other parts of the People's Republic of China will not apply within the Region. This is true even of the most serious political offenses.

Article 23 of the Basic Law requires the Hong Kong SAR to enact laws "on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organisations or bodies conducting political

activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies." This clause would be nonsensical if PRC criminal law was to be applied within the territory.

However, the exclusion of PRC substantive criminal law from within the Hong Kong SAR might not of itself be sufficient to enable the government of the Region to ensure compliance with speciality safeguards. It would certainly not address problems of resurrender or the extraterritorial characteristics of PRC criminal law. The latter is potentially significant in this way.

The exclusion of the criminal law of other parts of the People's Republic of China from the Hong Kong SAR means that a person who behaves within the jurisdiction of the Region in a manner which does not amount to an offense according to the laws of the Region is not punishable within the Region because the behaviour would have amounted to an offense according to general PRC law had it occurred, for example, in Beijing. However, suppose such a person later travels to Beijing? Does article 18 of the Basic Law mean that articles 3, 4, 5, and 6 of the Criminal Law of China, which together currently permit prosecution by Mainland authorities of persons found in China but with respect to conduct which occurred in Hong Kong,[32] will not apply to conduct occurring within the Hong Kong SAR?

Before extradition to the Hong Kong SAR is acceptable to most foreign jurisdictions, it will be necessary to demonstrate that persons returned to the Region will be physically secure from removal to other parts of the People's Republic of China, that the judicial and executive organs of the Region will be solely responsible for and able to control the manner and circumstances of such a person's trial and/or punishment, and that the government of the Region will be able to ensure a genuine opportunity for surrendered persons to leave the Region in the manner speciality and non-resurrender safeguards require. Assuming acceptance of good faith on all sides, the following provisions in the Basic Law, additional to those already mentioned, should be sufficient to satisfy potential extradition partners:

- maintenance of public order within the Region will be the responsibility of the Hong Kong SAR government (art. 14);
- PLA forces stationed in the Region will not interfere in the local affairs of the Region (art. 14);
- "No department of the Central People's Government and no province,

autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law" (art. 22);
- the Hong Kong judicial system is to be independent, possessing final powers of adjudication and to have jurisdiction over all cases in the Region (art. 19, see also arts. 80-94);
- the Department of Justice of the Hong Kong SAR shall control criminal prosecutions free from any interference (art. 63);
- the Hong Kong police force is to remain as a separate entity (implicit in arts. 14, 22);
- the Government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in, and departure from the Region by persons from foreign states and regions (art. 154);
- persons holding valid travel documents will be free to leave the Region without special authorization (art. 31);
- subject to approval from Beijing, foreign states will be able to maintain consular offices within the Region, thereby avoiding the necessity to use diplomatic channels in Beijing (art. 157).

Conclusion

The desirability of maintaining law and order within Hong Kong now and after 1997 is common ground between Hong Kong, the United Kingdom, and the People's Republic of China. The utility of international cooperation in this regard is also not disputed. Furthermore, the Basic Law may be said to facilitate or, at the very least, not foreclose the possibility of the Hong Kong SAR having substantial, if not sole, responsibility for its extradition processes. It is not, therefore, surprising that of all the attempts by Hong Kong to secure a large measure of autonomy over some aspect of its external affairs, that with respect to extradition relations between Hong Kong and foreign jurisdictions looks to be one of the most likely to succeed.

Notes and References

1. See section 34(3) of the Extradition Act 1989, perhaps reinforced by section 32(1) of that Act and the Interpretation Act 1978 s. 17(2)(b). The Fugitive Offenders (Hong Kong) Order 1967 was originally made under section 17 of the Fugitive Offenders Act 1967, otherwise repealed by the Extradition Act 1989.

2. The Order also applied with respect to requests from the Republic of Ireland.

3. The post-1989 position is complex. The Extradition Act 1989 repealed the Extradition Act 1870, which had applied to all colonies by virtue of its own terms, sections 6 and 17. The Extradition Act 1989 does not so apply. However, section 1(3) of the 1989 Act does say, "Where an Order in Council under section 2 of the Extradition Act 1870 is in force in relation to a foreign state, Schedule 1 of this Act (the provisions of which derive from that Act and certain associated enactments) shall have effect in relation to that state, but subject to the limitations, restrictions, conditions, exceptions and qualifications, if any, contained in the Order." In addition, section 37(2) of the 1989 Act provides, "The repeal by this Act of the Extradition Act 1870 does not affect an Order in Council made under section 2 of that Act or the power to revoke or alter such an Order." These provisions are regarded by the Legal Department as a sufficient basis for a continued legislative power to extradite to non-Commonwealth jurisdictions. This view was accepted by the court in *Law Kin Man v Government of the United States of America and Another*, Civil App No. 161/1990 (CA). An alternative point of view could be suggested. Since the Extradition Act 1870 was part of the law of Hong Kong and not merely part of the law of England relevant to Hong Kong, the repeal of this legislation in the United Kingdom has no effect in Hong Kong. Michael J. Downey, "The Laws of Hong Kong" (1989) 19 HKLJ 147, 179.

4. See Order in Council, 20 March 1877, directing that the "Extradition Ordinance (Hong Kong) 1875" shall apply and be read as part of the Extradition Act 1870 in Hong Kong.

5. This ordinance was originally enacted as ch. 26 of 1889, printed as ch. 7 of 1889 in Laws of Hong Kong 1938 (J. Fraser ed.), the last in a series of ordinances intended to give effect to extradition provisions contained in article IX of the Supplementary Treaty of 1843 and the Treaty of Tiensin 1858, both between the governments of Imperial China and Great Britain. The legislation has been effectively inoperative since the end of Kuomintang dominance in Guangdong Province.

6. See *Barton v Commonwealth of Australia* 131 C.L.R. 477, 485 (1974-75). As to the Governor's prerogative powers, see P. Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, 2 vols. (Hong Kong: China and Hong Kong Law Studies Ltd., 1987), 1: 151-57.

7. There are at least forty-three bilateral extradition treaties applicable to Hong Kong. In addition, the following orders provide more limited relations with parties to particular multilateral conventions: the Extradition (Genocide) Order 1970 (S.I. 1970 No. 147); Hijacking Act, 1971 (Overseas Territories) Order, 1971 (S.I. 1971 No. 1739); Extradition (Hijacking) Order 1971 (S.I. 1971 No. 2102); Tokyo Convention Act, 1967 (Overseas Territories) Order 1968 (S.I. 1968, No. 1864); Extradition (Tokyo Convention) Order, 1971, (S.I. 1971, No. 2103); Protection of Aircraft Act, 1973 (Overseas Territories) Order, 1973 (S.I. 1973, No. 1757); Extraditions (Protection of Aircraft) Order, 1973 (S.I. 1973, No. 1756); Internationally Protected Persons Act, 1979 (Overseas Territories) Order (S.I. 1979, No. 456); Extradition (Internationally Protected Persons) Order 1979 (S.I. 1979, No. 453); Taking of Hostages (Overseas Territories) Order 1982 (S.I. 1982, No. 1540); Extradition (Taking of Hostages) Order 1985 (S.I. 1985, No. 751). Section 37(6) of the Extradition Act 1989 protects the continued application of these Orders in Council.

8. Both documents provide that laws previously in force will continue in force after 1 July 1997, but both also define what is meant by "laws previously in force." United Kingdom statutes and subsidiary legislation are significantly omitted. See Joint Declaration, Annex I, section II, and Basic Law, arts. 8, 18.

9. See the Convention for the Suppression of Unlawful Seizure of Aircraft 1970, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, the Convention on the Prevention of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1973.

10. In 1815 the British law officers advised that there was no prerogative power to surrender persons lawfully within British territory to another state or jurisdiction for the purpose of prosecution or punishment. Statutory authority is required. See 6 British Digest of International Law 453-61.

11. Letters Patent 1917-1991, art. VII(1).

12. Colonial Laws Validity Act s. 2, in this respect declaratory of the common law. Parliament has authorized limited repugnancy by means of the Hong Kong Act 1985, not relevant to our present discussion.

13. LP 20, and see Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, 1: 270.

14. There is apparently some debate about this, but see ibid., p. 269; especially the quotation from *Pong Wai-ting* (1925) 20 HKLR 22, 26. The power to legislate for Hong Kong by Order in Council has been retained by the United Kingdom Crown, Letters Patent, art. IX.

15. See Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, 2: 266.

16. Royal Instructions, clause 26.

17. Letters Patent, art. 8; Royal Instructions, clause 28.

18. See *Re an Application by the Attorney General* [1985] HKLR 381, 386.

19. See Hong Kong Act 1985, The Hong Kong (Legislative Powers) Order 1989 (S.I. No. 153 1989).

20. *Ashbury v Ellis* [1893] AC 339, *Trustees Executors and Agency Co. Ltd v F.C.T.* (1933) 49 C.L.R. 220.

21. See, for example, discussion in Forest, *Extradition to and From Canada* (1961 New Orleans) 3-4, In re Gleich, reported in 1880 New Zealand Journal, A 6.

22. D.P. O'Connell, "The Doctrine of Colonial Extraterritorial Legislative Incompetence" (1959) 75 LQR 318; P. Wesley-Smith, "Extraterritoriality and Hong Kong" (1980) Public Law 150.

23. The Hong Kong (Legislative Powers) Order 1989.

24. Fugitive Offenders (United Kingdom Dependencies) Order, 1969 (L.N. 15/69 as amended by L.N. 78/77, L.N. 158/80); Fugitive Offenders (Designated Commonwealth Countries) Order, 1968 (L.N. 1368 as amended by L.N. 32/68, L.N. 99/68, L.N. 155/70, L.N. 193/70, L.N. 135/71, L.N. 186/74, L.N. 233/75, L.N. 176/76, L.N. 23/77, L.N. 87/79, L.N. 157/80, L.N. 249/82).

25. The word "foreign" is added before the word "states."

26. J. Brabyn, "Extradition and the Hong Kong Special Administrative Region," in (1988) 20 Journal of International Law 169, 171.

27. *Blacks Law Dictionary*, Rev. 4th ed. (West Publishing Company, 1968).

28. One of the latter has indicated that "juridical" was used in the English version of the Basic Law in order to conform as closely as possible to the official English text of the Joint Declaration.

29. Article 18 of the Basic Law, 2nd and 3rd paragraphs.

30. Registration is a purely mechanical act and has no effect on the validity or otherwise of the treaty or agreement registered. A.D. McNair, *Law of Treaties* (Oxford: The Clarendon Press, 1986), p. 192. However, only registered treaties or agreements may be invoked by parties thereto before any organ of the United Nations.

31. It has recently been reported in the press that the Executive Council has approved in principle the negotiation of some form of extradition arrangement between Hong Kong and the remainder of the People's Republic of China, hopefully to continue in effect after the transition. Work is not expected to begin until the international process is well under way. *Sunday Morning Post*, 23 June 1991.

32. Either by virtue of the territory being regarded as a part of the PRC (which the Hong Kong SAR certainly would be) or the person being a PRC national or the conduct having a relevant consequence within the PRC.